IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903. No. 409.

The Interstate Commerce Commission, Appellant,

vs.

David G. Baird, Fred. F. Chambers, George O. Waterman, et al.

BRIEF OF ARGUMENT ON BEHALF OF GEORGE F. BAER AND WILLIAM G. BROWN, APPELLEES.

STATEMENT OF THE CASE.

These cases originated by the presentation of the petition of the Interstate Commerce Commission, to the judges of the Circuit Court of the United States for the Southern District of New York (Record, page 2), which set forth among other things, that:—

On November 2d, 1902, the petition and complaint of William Randolph Hearst, against the Philadelphia and Reading Railway Company, and nine other railroad transportation companies was received by the Commission and filed in its office; that a copy of the complaint was forthwith forwarded by the Commission to each of the carriers named in the complaint; that thereafter each of the carriers named in the complaint made answer thereto and said answers were filed by the Commission in its office;

that on March 12th, 1903, the Commission ordered a hearing on said complaint at the post office building in the city of New York on April 21st, 1903. (Record, page 2.)

The petition then proceeds to recite the issuance and due service of subpœnas upon the various witnesses named in this proceeding and others, and the attendance of the Commission and the attorneys of the parties at the hearing April 21st, 1903 (Record, page 2, 3), at the post office building in the city of New York.

The Hearst complaint appears on the Record, page 39, and charges the exaction of unjust and unreasonable rates on anthracite coal, which are also discriminative by comparison with rates on other traffic; that rates are fixed and maintined by combination and agreement; that the traffic is pooled or divided between the different lines in agreed proportions, and that earnings are pooled, &c.

All which allegations are denied under oath, either generally or specifically and in more or less detail by the various respondents. (See answers, Record, pages 45 to 54.)

The answer of the PHILADELPHIA AND READING RAILWAY COMPANY to the Hearst complaint is in substance as follows (Record, page 52):—

> "1. This defendant admits that in respect of a comparatively small proportion of the anthracite and bituminous coal carried by it over portions of its lines, it is a common carrier subject to the provisions of the Act entitled 'An Act to regulate commerce,' approved February 4th, 1887, and the Acts amendatory thereof and supplemental thereto, so far as they are valid.
>
> "2. This defendant, however, denies that it is doing, or has done or committed any act or thing whatsoever, or has omitted or is omitting any duty in violation of the said Act or its said amendments or supplements, and it specifically denies in general and in detail each and every charge, statement, or inference contained in said petition to the contrary thereof, and that each and every charge of unlawful combination, confederation, or agreement respecting any of the said several matters and things

"3. And further answering in respect of the said charges of unlawful combination, confederation, agreement, pooling, &c.

* * * * * *

"This defendant avers that every charge contained in the said paragraph of unlawful agreement, combination, or confederation in any manner or form, or for any purpose whatsoever, is false and untrue."

And thus the issues were joined on which the Commission proceeded to hearing.

As to the Case of William G. Brown, Appellee.

The petition of the Commission to the Circuit Court shows (Record, page 10):—

At the hearing on April 22d, 1903, William G. Brown was called as a witness on behalf of the complainant, and, having been duly sworn, the following proceedings took place:—

MR. SHEARN:—Q. Mr. Brown, you are the secretary of the Philadelphia and Reading Coal and Iron Company?

MR. BROWN:—A. Yes, sir.

MR. SHEARN:—Q. That is a corporation organized under the laws of what State?

MR. BROWN:—A. The State of Pennsylvania.

MR. SHEARN:—Q. Who is the president of the Philadelphia and Reading Coal Company?

MR. BROWN:—A. George F. Baer.

MR. SHEARN:—Q. What business is the Philadelphia and Reading Coal and Iron Company engaged in?

MR. BROWN:—A. In the mining and sale of coal.

MR. SHEARN:—Q. What is the capital stock of the company?

MR. BROWN:—A. $8,000,000.

MR. SHEARN:—Q. Who owns it?

MR. BROWN:—A. It is owned almost entirely by the Reading Company.

MR. SHEARN:—Q. s it not owned entirely by it?

MR. BROWN:—A. t is owned entirely.

COMMISSIONER PROUTY:—Q. What is the Reading Company?

MR. CAMPBELL:—A. It is a corporation which holds the stock, as well as other investments, the stock of the Philadelphia and Reading Coal and Iron Company, the stock of the Philadelphia and Reading Railway Company ——

* * * * * * *

MR. SHEARN:—Q. Mr. Brown, you, as secretary of the coal and iron company, have custody of its papers and contracts, have you not?

MR. BROWN:—A. I have; yes, sir.

MR. SHEARN:—Q. You have been served with a subpœna to produce all contracts entered into between the Philadelphia and Reading Coal and Iron Company and third parties for the purchase of anthracite coal, since January 1st, 1901, have you not?

MR. BROWN:—A. Yes, sir.

MR. SHEARN:—Q. Are there such contracts in existence?

MR. BROWN:—A. There are.

MR. SHEARN:—Q. How many of such contracts? * * *

MR. BROWN:—A. I do not remember the exact number; six, seven, or eight, possibly. * * *

MR. SHEARN:—Now, produce those contracts, please.

MR. CAMPBELL:—The witness is instructed to decline to produce the contracts, for the reason stated by Mr. Thorne in respect to the demand made upon the Lehigh and Wilkes-Barre Company, and counsel asks the stenographer to set forth in the record these reasons.

I advise the witness to decline to produce the contracts and I take it the Commission will deliver its directions as it has done in the other case.

THE CHAIRMAN:—By your objection you refer to what has been stated by other counsel?

(The objection stated by Mr. Thorne in connection with the examination of George O. Waterman, secretary of the Lehigh and Wilkes-Barre Coal Company is as follows: (Record, page 8.)

"Witness, under advice of counsel, declines to produce the contracts for the reason that they are not germane to

any issue presented before this Commission, and they are not relevant or material to any issue that is within the power of this Commission to investigate, and they are contracts with third parties who are not parties to this proceeding and action, and are private business and should not be made public and disclosed in this proceeding."

THE CHAIRMAN:—The objections are overruled, and the Commission directs the witness to produce the contracts. (After a pause) The witness declines to do so, under the advice of counsel. (Record, page 12).

June 2d, 1901, on consideration of the petition of the Interstate Commerce Commission the Circuit Court awarded a rule upon the various witnesses named in the petition to appear and show cause why the prayer of the Commission should not be granted and orders entered accordingly. (Record, page 1.)

The witness, Brown, appeared with others and answered the rule in writing, under oath, substantially as follows: (Record, page 112.)

> "I. That he is the secretary of the Philadelphia and Reading Coal and Iron Company, a corporation of Pennsylvania, created by and existing under an act of the General Assembly of the State of Pennsylvania, approved May 8th, A. D. 1871, with power, among other things, 'to purchase, sell, transport and mine coal, and to mine and manufacture iron, * * * to acquire by purchase, or otherwise such lands as they may deem expedient; * * * to lease, sell, mortgage, or otherwise dispose of such land, or any rights, easements, or privileges therein; * * * construct all necessary buildings and fixtures necessary for the business of mining and for preparing coal for market, mining and manufacturing iron, and the accommodation of persons engaged in their employ in said business,' a copy of which said Act and of the proceedings whereby the name of the company was changed from the Laurel Run Improvement Company to the Philadelphia and Reading Coal and

Iron Company are hereto annexed and made part hereof, marked 'Exhibit A.' (See Record, page 117).

"II. This respondent admits the creation and existence of the petitioner as alleged, and also the exhibition to them of the petition and complaint of William Randolph Hearst against the various railroad companies in the petition mentioned. He admits the allegations of the petition in respect of the hearing of the said last-mentioned petition and complaint within the southern district of New York.

"III. This respondent further admits that the said Interstate Commerce Commission, on the application of the attorney for the said petitioner and complainant, awarded its writ of subpoena *duces tecum* to him directed commanding him 'to produce all contracts for the purchase or transportation of anthracite coal entered into since January 1st, 1901, between the Philadelphia and Reading Coal and Iron Company and any and all purchasers of anthracite coal or owners or operators of anthracite coal mines.'

* * * * * * *

"3. This respondent is further advised, and therefore alleges and charges, that the books, papers, tariffs, contracts, agreements, and documents which the Commission has power under the act to regulate commerce to require to be produced, are only and solely books, papers, tariffs, contracts, agreements, and documents of the carrying companies subject to the act to regulate commerce, or of consignors or consignees having contracts with such carriers where the subject matter of such contracts are being inquired into, and that the said provisions of the said Act of Congress confer no power whatsoever upon the Commission to search for or inquire into or expose the private papers or other papers of parties not directly concerned in matters committed to the said Commission.

"This respondent, for himself and for his said company admits that the proceedings at the hearing be-

fore the Interstate Commerce Commission on April 22d, 1903, and set forth in folios 34 to 40, inclusive, referring to pages 243 to 258 of the stenographer's minutes of said proceedings—though not fully—are sufficiently set forth in the said petition of the Interstate Commerce Commission to this court, save and except that the objection to the production of the said papers stated by counsel is omitted, which said statement was set forth by Mr. Thorne, of counsel with the Lehigh and Wilkes-Barre Coal Company, as shown on page 220 of the said stenographer's minutes in the words following:——

"'MR. THORNE:—Witness, under advice of counsel, declines to produce the contracts for the reason that they are not germane to any issue presented before this Commission, and they are not relevant or material to any issue that is within the power of this Commission to investigate, and the contracts with third parties, who are not parties to this proceeding and action, are private business and should not be made public and disclosed in this proceeding.'

* * * * * * *

"That during the hearing before the Interstate Commerce Commission there was under consideration the demand of the petitioner for the production by the Lehigh Valley Coal Company of certain coal-purchase contracts supposed to have been entered into by it with the certain miners and producers of anthracite coal whose operations were located on the line of the Lehigh Valley Railroad Company, whereupon a copy of one of said contracts was submitted to the consideration of the Commission for the purpose of determining their admissibility in evidence, and thereupon the chairman of the Commission announced, as appears on page 193 of the stenographer's notes of the said hearing, the following:—

"'THE CHAIRMAN:—During the recess the Commission has briefly examined the blank contract which was submitted to our inspection by the cour-

tesy of counsel. We understand from counsel that all the stock of the Lehigh Valley Coal Company, which is denominated the buyer in this contract, is owned by the Lehigh Valley Railroad Company, and it appears from an inspection of the contract that the prices paid to the seller are certain percentages of the prices for which coal is sold at tidewater terminals. If the balance retained is less than the amount paid the Railroad Company, the Coal Company sustains a loss in the transaction, which is hardly to be assumed. However this may be, the facts alleged to be contained in these contracts may properly be shown, we think, and we also think that the contracts are competent evidence of the fact. We therefore overrule the objection and allow the contracts to be put in evidence.'

"And this respondent alleges that in respect of the contracts which he has been called upon to produce, the said inferences so set forth in the opinion of the chairman of the Commission are unwarranted and unwarrantable, in fact only a small proportion of the coal sold by the Philadelphia and Reading Coal and Iron Company reaches tidewater terminals, and only a comparatively small proportion enters into Interstate Commerce; that in truth and in fact, owing to the divers markets to which this coal is consigned and the divers rates of freight to the said various markets, there remains to the Coal and Iron Company, on all its transactions for the purchase of coal, a large annual profit after paying full tariff rates to the railroad companies for transportation; that the inference of the Commission expressed in the words following: 'If the balance retained is less than the amount paid the Railroad Company, the Coal Company sustains a loss in the transaction,' could not apply to the contracts of any of said companies, unless all of the coal purchased was all shipped to a point where the transportation rate exceeded the balance remaining of the proceeds after paying sixty-

five *per centum* of the f. o. b. price to the seller under said contracts; and further, this respondent avers that as appears by the undisputed testimony of George F. Baer, Esq., hereinafter referred to, a large annual profit accrues to the said Philadelphia and Reading Coal and Iron Company from the sale of the coal purchased under said contracts after the payment of full regular tariff rates for transportation, notwithstanding the said inference of the said Commission in such opinion, and of said Shearn in said affidavits.

"This respondent is advised and believes, and therefore charges, that it is the uncontradicted purport and effect of the testimony of George F. Baer, Esq., the president of this respondent's company and of other corporations, who was called as a witness before the said Commission on behalf of the petitioner and complainant; that there is no foundation whatsoever in truth and in fact for the various allegations on which said subpœna *duces tecum* was issued; that neither in their inception, nor in their operation nor effect do the contracts which this respondent is called upon to produce, or either of them, in anywise relate to or bear upon any of the matters pending before the Commission under the said petition and complaint of said Hearst; that said contracts are not and will not be of service in the determination of said case; that they do not contain evidence material to the petitioner and complainant; that they are not in reality contracts fixing the rate of anthracite coal from the mines to destination, as is alleged by said Shearn in his said affidavit, but that they are in truth and in fact, as they purport to be, *bona fide* contracts made in Pennsylvania, solely for the uses and purposes therein mentioned; that neither in their inception nor in their performance have they any relation whatsoever to the subject of transportation; that the subject matter thereof is confined to the sales and delivery of anthracite coal produced within the Com-

monwealth of Pennsylvania to be delivered there, regardless of the ultimate market to which the coal may be shipped, and also regardless of the transportation charges thereon; that the said contracts do not purport, in any degree, to be dependent upon the rates of transportation, paid or to be paid; that in view of the character of said contracts, as shown by the said testimony of George F. Baer, Esq., they are wholly local and domestic contracts made and performable wholly within the State of Pennsylvania, and that therefore they in no wise bear upon or relate to commerce between the States or with foreign nations; that said contracts and the performance thereof are wholly of local cognizance and are without the jurisdiction of the Interstate Commerce Commission under the Act to Regulate Commerce, and are wholly without the jurisdiction of the Congress of the United States, and therefore may not lawfully be inquired into here. All of which will more fully and at large appear by reference to the stenographer's notes of the testimony of the said George F. Baer, Esq., before the Commission, a copy whereof is hereto attached and made part hereof, marked "Exhibit B." (Record, pages 120-209) And this respondent further shows that it is the general result of all the testimony so far adduced before the said Commission that the said contracts are of the character, purport, operation, and effect in this paragraph set forth and not otherwise.

"This respondent, for himself and his said company, further shows that he is ready and willing to appear before the Commission and to answer any question within his knowledge which the Commission may determine to be material bearing upon or relating to the relations of his said company as a shipper of interstate traffic with any of the respondent carriers in the proceeding pending before said Commission, and to produce any books, contracts, or other papers bearing upon or relating thereto, but this re-

spondent respectfully objects to and protests against any order herein which may be construed by the Commission to require him or any subordinate officer or agent of his company to appear and testify concerning the private dealings of his said company as a merchant either in respect of its mining, purchase, or sale of any commodity, for that the same are neither within the cognizance of the said Commission nor of the Congress of the United States."

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The origin, history, purpose and effect of the coal sales contracts, are fully set forth in the testimony of George F. Baer. Record, pages 163-167, as follows:—

MR SHEARN:—Do you recollect having an interview with Mr. Carroll D. Wright, in November, 1902?

MR. BAER:—Yes, sir.

MR. SHEARN:—Did you say as follows, referring to the preceding strike, that,

"Shortly after this strike was inaugurated Senator Hanna met a number of gentlemen and insisted that if the strike were not settled it would extend to Ohio, Indiana, and Illinois, and the election of Mr. McKinley and Mr. Roosevelt would be endangered. He insisted that he was authorized to settle the strike through Mr. Mitchell, if the operators would agree to a ten per cent. advance in wages. After a great deal of pressure had been brought to bear upon the presidents of the coal companies and positive assurances were given that the situation was really dangerous, President McKinley, sending to me personally a gentleman to assure me that Ohio and Indiana were in danger unless some adjustment was made, we agreed to put up a notice which was prepared, as we understood, at Indianapolis and furnished by the United Mine Workers. The private operators absolutely refused to join in this advance, and instead of the strike being ended, as promised, it continued on for some time, and it became necessary, in order to relieve the situation, to call a meeting of the private operators with the presidents of the coal companies and to agree with them that if they

would put up notices to pay ten per cent. increase we would meet a committee which they should appoint and endeavor to increase, if possible, the price of coal. They agreed to this; a committee was appointed by private operators, and we sat two or three days a month for three months to reach an agreement with them. That agreement involved a heavy compensation to the private operators from the coal companies. The coal companies had agreed to change the basis of coal purchased from the private operators from a basis of forty per cent. and sixty per cent., to a basis of thirty-five per cent. and sixty-five per cent. In other words we had to decrease five per cent. and they increased five per cent."

You stated that to Mr. Wright?

MR. BAER:—I did, I assume; it sounds all right—if you have read it correctly.

MR. SHEARN:—That is the fact, is it not, anyway?

MR. BAER:—Yes, sir; it is the fact.

MR. SHEARN:—Now, the increase of price that you agreed to try to bring about between you was, I suppose, the price of coal to the independent mine owner, not to the price to the consumer? What price were you referring to that you would attempt to put up—the retail price of coal or the price to the operator?

MR. BAER:—It says exactly that it was to the independent operators who were selling their coal. Instead of selling it on the basis of sixty per cent. f. o. b. New York, they were to get sixty-five per cent.

MR. SHEARN:—So that referred, of course, to the price of their coal sold to your coal companies?

MR. BAER:—Yes, sir.

MR. SHEARN:—Where were those conferences held?

MR. BAER:—In Philadelphia.

MR. SHEARN:—Do you recollect who the committee representing the operators consisted of?

MR. BAER:—Why, Congressman Connell ——

MR. SHEARN:—Mr. Kemmerer was ——

MR. BAER:—Just wait until I get the whole thing back in my mind—Dr. Howe and Mr. Kemmerer. I think they were the only three.

MR. SHEARN:—You had several conferences at which they made representations to you and there was much discussion pro and con?

MR. BAER:—Oh, yes.

MR. SHEARN:—Was Mr. Truesdale present at the conference?

MR. BAER:—Well, at one or two he was, I think.

MR. SHEARN:—Was Mr. Garrett present?

MR. BAER:—Mr. Garrett was present at most of them.

MR. SHEARN:—Who else was present from the railroad companies or from the coal companies?

MR. BAER:—Why, Mr. Cumming.

MR. SHEARN:—Of the Erie?

MR. BAER:—Of the Erie—Mr. Cumming of the Erie, Mr. Garrett, and myself were the three there most of the time, and at times I recall Mr. Truesdale being there, once or twice.

MR. SHEARN:—You came to an agreement, didn't you?

MR. BAER:—Came to an agreement?

MR. SHEARN:—Yes, sir.

MR. BAER:—No; we did not come to an agreement. We suggested a plan to the coal companies and operators based upon the sixty-five per cent. contract and suggested—we outlined a plan and suggested that the companies on that basis, the coal companies, should make contracts with their private operators, or such of them as were willing to enter into contracts.

MR. SHEARN:—You had a draft form of agreement there, didn't you?

MR. BAER:—The form of agreement was revised and revised at every meeting.

MR. SHEARN:—And finally you and the committee came to a tentative agreement upon the contents of the proposed contract, didn't you, as stated in this report I have read to you?

MR. BAER:—An agreement was reached by the committee by we persons agreeing to recommend to the private operators and the coal companies the making of the contracts on this basis. There was no agreement about it. We had no power to make an agreement.

MR. SHEARN:—When you got through with your last conference the gentlemen representing the coal companies had come to an understanding as to what form of contract you were willing to enter into, had you not?

MR. BAER:—No; there was no agreement about it one way or another. The committee was acting representing all parties, and we recommended, as I recall it now, to the coal companies and to the individual operators the making of contracts on that basis. The form was a general form that would not suit all conditions, you see, and it was simply the basis of a contract in its general terms as to the sixty-five per cent. and as to the terms of payment, and the great fight we had, as I recall it, was on the proportion of coal and on the sizes of coal. Some of the private operators insisted upon changing the sizes of coal, and a good many of them wrote long letters to us insisting that what we called the inspection of the coal, by which the slate and the foreign matter is eliminated, was too rigid, and wanting an allowance of a larger percentage of slate—details of that kind.

MR. SHEARN:—The essential thing that was under consideration was the increase of the price from sixty to sixty-five per cent. of the tidewater price on prepared sizes?

MR. BAER:—You may say that was the essential, that the price is the essential thing, but the real essential thing in fixing that basis was to have the contract clearly define the character of the coal. Anthracite coal can be mined so full of foreign matter and slate that its merchantable quality very much depreciates, and the standard we had established as the basis of purchase was the source of long and protracted talk; it took up five times as much time as anything else, as you will see by the details in the contract. The object of the coal companies being the purchasing company, was to get clean, merchantable coal and also to get a clear definition of the sizes of coal.

MR. SHEARN:—And the object of the operator was to get an increased price?

MR. BAER:—To get the increased price and have as

low an inspection as possible, which affected the quality of the coal.

MR. SHEARN:—Bebore these conferences had terminated you gentlemen representing the railroads had ——

MR. BAER:—Not representing the railroads.

MR. SHEARN:—Representing the coal companies had come to the conclusion that you were willing to pay sixty-five per cent. of the tidewater price?

MR. BAER:—Yes, sir.

MR. SHEARN:—And you so announced that to the committee, did you not?

MR. BAER:—Yes, sir.

MR. SHEARN:—Does that sixty-five per cent. mean sixty-five per cent. of the price of each man's coal at tidewater, or sixty-five per cent. of the general price of all coal, of the same grade, sold during a given month at tidewater?

MR. BAER:—I will have to refer you to the contract. I really cannot carry those details in my mind. There is a specific provision in the contract relating to that, I am sure, but I cannot recall it from recollection.

COMMISSIONER PROUTY:—Do you know, as a matter of fact, how that is got at?

MR. BAER:—My recollection of that is this: That the f. o. b. price of white ash coal—you see there are so many kinds of coal that we have to take a standard coal. It is taken in New York, the f. o. b. price in New York, and all the coal of that particular region, the white ash coal, is taken to make the common basis of payment. For example, the Schuylkill region, or the shippers from the Schuylkill region, bring white ash f. o. b. New York. That has to be the basis of payment, say in the Wyoming region, of what other coals bring. These coals all differ in quality.

COMMISSIONER PROUTY:—You put all on the same basis of the same quality of coal?

MR. BAER:—Yes, sir; to get at a common basis for the same quality coal and that is done by a statistician, Mr. Ruley, who gets the prices, and the operators have a right

to call on the coal companies to send in a statement of the prices at which they have sold all this coal, and then he makes up a statement and ascertains the average price. We never look beyond that. We think he is perfectly competent.

COMMISSIONER PROUTY:—You say the coal companies send to him a detailed statement of coal and the prices on what they have sold?

MR. BAER:—Yes, sir.

MR. SHEARN:—The various coal companies employ Mr. Ruley to get these figures up for them?

MR. BAER:—Mr. Ruley is a statistician and gets up all kinds of figures for us in relation to the coal trade. We report to him everything about the business, where we sell the coal, and all that, so that he prepares for us statements—how much coal has been sold in Brooklyn, and who sold it, and what prices it brought, and he gives monthly statements—statements of how much coal each of the companies transported to market.

THE CHAIRMAN:—And how much each one sold of a given grade?

MR. BAER:—Yes, sir; all different grades.

THE CHAIRMAN:—Is that the basis on which the settlement is made?

MR. BAER:—No; the payment is made on domestic—there are different kinds. Sixty-five per cent. is not the whole of the story. That is on domestic sizes.

MR. SHEARN:—Prepared sizes?

MR. BAER:—The other sizes call for a different payment, which I do not remember; that differs. The contracts are not uniform on that.

MR. SHEARN:—But as to the sixty-five per cent. payment?

MR. BAER:—As to the sixty-five per cent., on what we call prepared sizes; I think the contracts are uniform on that; but they are not as to the smaller sizes of coal.

MR. SHEARN:—We are speaking of prepared sizes. I should come to the conclusion, from what you have said, that the statement is made for prepared sizes on sixty-

five per cent. of the general average price prevailing during the month on the sales made; not sixty-five per cent. of the price that each individual operator's coal is actually sold for.

MR. BAER:—The general market price for that particular kind of coal at a particular market, as I recollect it.

MR. SHEARN:—You are unable to differentiate between the individual miner's coal and your own coal? It all goes into a common supply, does it not, and is sold?

MR. BAER:—That is the reason of it. The advantage we have, the great advantage to us, is that we can take the coal from all these private operators and have it consigned with our coal. It saves us a great deal of cost and trouble in keeping the coal separate and selling on each man's account. It becomes a part of our coal that we purchase and we give him the average price we obtain for the coal.

THE CHAIRMAN:—That seems to dispose of the question, Mr. Shearn.

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Record, page 196:—

MR. SHEARN:—The rate of freight on anthracite coal is a mere name. It does not mean anything, does it, under your method of operation? The rate you get for transporting anthracite coal for the Reading Coal and Iron Company is based entirely on what the Reading Coal and Iron Company has left after it pays for the mining of the coal and the selling of the coal?

MR. BAER:—You are greatly mistaken. The Reading Coal and Iron Company pays its freight on all the coal it transports, either directly or indirectly, through the consumer; that is to say, when we sell coal in New York we sell it f. o. b., and the Coal and Iron Company has to pay the freight to the railroads. If we sell it from the mine the freight follows the cargo, you understand, and the purchaser, the consignee, pays it there; but in every instance the Coal and Iron Company or the consignee of the Coal and Iron Company, pay full rates. There are no rebates given the Coal and Iron Company,

even on this purchased coal. Argument was made—and I will state it on the basis of a thirty-five per cent. contract. Out of that thirty-five per cent. the Coal and Iron Company is able to pay the full freight rate and to pay all the costs of handling its coal—I mean of selling it—to deduct all the risks and still make a profit.

MR. SHEARN:—How does it do it?

MR. BAER:—How do they do it?

MR. SHEARN:—Yes, sir. Coal is only $4. There is only $1.40 left.

MR. BAER:—That is the error you make again in assuming that New York is the world. At New York you sell a small quantity of coal at $4, but at other places the freight rate is much lower and the price much higher. Now, the rate in New York, the f. o. b. price, fixes the price for all the coal, and in every month of the year we make a profit on the coal we purchase. Of course, if the Coal and Iron Company sold all its coal in New York, instead of only its surplus there, at $4 it could not pay the railroad its freight rate; but suppose you have ninety per cent. of the colliery capacity, which you sell at a large profit, and the other ten per cent. you have to sell in New York below the current price, say $4, then the Coal and Iron Company would have only $1.40 with which to pay freight, but in some other places, locally, it will get a much greater profit; that thirty-five per cent. will be much more to them, and therefore it is the Coal and Iron Company is able to pay full freights and still make money.

MR. SHEARN:—You make the other localities pay the higher rate of freight to New York, then?

MR. BAER:—New York is favored because it is competitive. There is no question about that.

MR. SHEARN:—I say you make the other communities pay the high rate of freight to New York. The difference is made up out of the other communities, then. Is that correct?

MR. BAER:—Not necessarily correct. You can readily see if coal is sold along the line, the charge of the railroad,

the rate of freight is small; the distance is small, and the Coal and Iron Company will make a profit on their coal. In a general way, in answer to your question, I will say that New York is the favored spot for long-haul anthracite coal; that you get your coal because of a lower freight rate proportionately and because of competitive conditions here at a lower price than they do in any other place. That is to your advantage. It is the natural advantage of location to which every community is entitled.

MR. SHEARN:—Well, then, when the return to the railroad company on coal shipped to New York is only $1.25 a ton, representing a loss of about twenty-five cents a ton to the Coal and Iron Company, you make that up in an extra charge of freight to some other locality, like Philadelphia, Baltimore, or Washington?

MR. BAER:—We do not. We have regular lines of freight. The freight has nothing to do with it. The Coal and Iron Company buys so many tons of coal, say a thousand tons of coal. It may sell nine hundred tons of that coal at a large profit. It may have a surplus of one hundred tons, which it sells at a loss; but taking the whole transaction, it makes a profit on the thousand tons, and is able, therefore, to pay the full freight rate to the transportation point. That is the whole story.

MR. SHEARN:—Then it does not take out of the proceeds of the sale of coal at New York the funds for the payment of freight to the railway company, but where they are insufficient it reaches out and takes part of the proceeds of the sale of coal in other communities along the line—at Philadelphia, Baltimore, Washington, or Boston?

MR. BAER:—It buys the coal of the colliery. It must take all that coal. At the end of the month it sees what has been the commercial result of that purchase. It finds as the commercial result on all the coal that it has made a profit—on all of it together—by which it is able to pay the freight and have a considerable sum in its treasury for itself to represent the reasonable profit it makes as a factor in selling the coal. Now, I can readily under-

stand if, in point of fact, these transactions resulted in a loss to the Coal and Iron Company that that might amount to a rebate, which would be unlawful, but in point of fact they do not. That is one of the things I think you have a right to inquire into. I am speaking positively, because I have the statement carefully made up, covering the period of time when these contracts began, because I was about to enter into a new contract, the first one I believe I had made under my administration, and before making it—I have not made it yet—before I went into it, I wanted to be certain that the commercial feature of it was satisfactory, and I directed the accounting officers to make up a careful statement by the month of the result to the Coal and Iron Company of these purchase contracts, and I find that the comparatively small number we have—there are only about a million tons—that we made a profit after paying full freights to the railroad company since November 1st, 1901, of over $300,000, and there was a profit every month; $300,000 was after paying full freights and after taking out a reasonable share of the general expense of selling coal.

As to the Case of George F. Baer, a Witness and Appellee.

To the rule granted by the Circuit Court, this witness answered that he was President of the Temple Iron Company, a corporation of Pennsylvania; that the proceedings before the Interstate Commission took place as set forth in the petition, wherein he "as an officer of the Temple Iron Company on the advice of Counsel declined to produce, or direct the production of certain agreements called for by claimants' Counsel, dated February 27, 1899, * * * and that this respondent then and there waived all questions as to the service of the writ of subpœna *duces tecum;* or to the said papers not being then in his actual custody, and all other technical questions of the same nature." (Record, pages 62-63.)

The answer then proceeds (Record, page 63):—

"This respondent, on behalf of the Temple Iron Company, of which he is president, now here produces and files for the information of this court copies of all the said agreements (Record, pages 78-93), and thereupon in his own behalf, on behalf of the Temple Iron Company, whose officer he is and whose papers they are, as well as on behalf of the Guaranty Trust Company of New York, the confidential custodian of the same, objects to and protests against the production of the said documents before the said Commission at the said hearing, for the reason that they appear on their face to be only and solely papers and documents of private parties, not parties to the proceedings before the Commission; that they related solely to the purchase of properties within the State of Pennsylvania, and to the securing the payment of the purchase money therefor; that both on their face and by the testimony before the Commission they are affirmatively shown not to bear upon or relate to commerce between States, nor any other subject within the cognizance of said Commission, nor to bear upon or relate to the relation of his company as a shipper of interstate traffic with any of the respective carriers in the proceeding pending before the said Commission; that the said contracts, and the performance thereof, are wholly matters of local cognizance and are without the jurisdiction of the Interstate Commerce Commission and the act to regulate commerce, and are wholly without the jurisdiction of the Congress of the United States, and, therefore, may not be lawfully inquired into by the said Commission. In support of which said allegations this respondent refers to and makes part of his answer herein a copy of the stenographer's notes of his testimony, a copy whereof is attached to and made part of the answer of William G. Brown, secretary of The Philadelphia and Reading Coal and Iron Company, filed herein

as an exhibit. (Record, pages 120-209.) And this respondent further shows that it is the general result of all the testimony so far adduced before the said Commission that the said contracts are of the character, purport, operation, and effect in this paragraph set forth and not otherwise.

"This respondent, for himself and his said company, further shows that the said corporation is not a shipper of coal or any other commodity over any of the lines of the respective companies; that he and his subordinate officials and agents are ready and willing to appear before the Commission and to answer any question within their knowledge which the Commission may determine to be material, bearing upon or relating to the relations of the said company as a shipper of interstate traffic with any of the respondent carriers in the proceeding pending before the Commission and to produce any books, contracts, or other papers bearing upon or relating thereto, but this respondent respectfully objects to and protests against any order herein which may be construed by the Commission to require him or any subordinate officer or any agent of his company or the said Guaranty Trust Company of New York, the confidential depository of said papers, to appear and testify concerning the private dealings of his said company either in the purchase of mines or stocks and interests therein, located within the Commonwealth of Pennsylvania, or any of the private dealings of his said company as a merchant either in respect of its mining, purchase, or sale of mines and stocks or of any commodity, for that the said several subjects are neither within the cognizance of the said Commission nor of the Congress of the United States." * * *

Having made profert of these various agreements, copies were filed with the answers, and appear in the Record, pages 77 to 93, and consist of a series of contracts dated February 27th, 1899.

I. Between Simpson & Watkins, at Scranton, Pa., vendors, and the Temple Iron Company, a corporation of Pennsylvania, the purchaser. (Record, page 78.)

The subject matter of this contract is shown in the first article:—

> "1. By these presents the vendors assign, set over, and transfer to the Temple Iron Company all of the capital stock, assets, and property, free of all debts, liens, and liabilities of every kind (except as hereinafter stated) of the following corporations:—
>
> "'(*a.*) The Forty Fort Coal Company;
> "'(*b.*) The Mount Lookout Coal Company;
> "'(*c.*) The Wyoming Land Company;
> "'(*d.*) The Wyoming Electric Light Company;
> "'(*e.*) The Babylon Coal Company;
> "'(*f.*) The Sterrick Creek Coal Company;
> "'(*g.*) The Edgerton Coal Company;
> "'(*h.*) The Hendrick Land Company;
> "'(*i.*) The Northwest Coal Company;
> "'(*j.*) The shares of the Lackawanna Coal Company, a limited copartnership of Pennsylvania.'"

The consideration to be paid is shown in the second article, which provides that (Record, page 79):—

> "* * * The Company will issue and deliver to the vendors, or upon their order, proper certificates for $2,260,000 of the full-paid capital stock of the company, and the bonds of the company for the aggregate principal sum of $3,500,000, bearing interest at the rate of four per cent. per annum, payable semi-annually at the office or agency of the company in the city of New York, and the principal payable on the first day of January, 1925, both principal and interest being payable in gold coin of the United States of the present standard of weight and fineness. * * *

The mortgage or collateral trust deeds securing such bonds shall provide for a possible issue of such bonds for an aggregate sum not exceeding $15,000,000 (of which $11,500,000 are to be reserved for the acquisition of other property), and shall contain proper provision for a sinking fund for the acquisition of such bonds, to be held for the purposes of said sinking fund at not over one hundred and ten per cent. and accrued interest. The terms of such bonds and of the indentures securing the same shall be determined by the parties hereto, or, in case of their inability to agree, by the Guaranty Trust Company of New York.

II. Between Simpson & Watkins, the above-named vendors, of the first part, and the Guaranty Trust Company of New York, a corporation of the State of New York, of the second part, reciting the foregoing agreement for the sale of the property therein mentioned, and providing for the deposit of the stock and bonds of the Temple Iron Company simultaneously with their receipt, the trust company to hold the same with power of sale and disposition in consideration of payment to the vendors of the sum of $3,238,396.66 and certificates of beneficial interest of the character therein provided in respect of $1,000,000 of such capital stock.

III. An agreement of the same date between the Temple Iron Company, Guaranty Trust Company of New York, and each of the several railway companies below named (Record, page 82), reciting the issue of stocks and bonds of the Temple Iron Company and the terms thereof, and reciting further as follows:—

"WHEREAS in the accomplishment of its said purposes the Iron Company desires that the Railway Company shall extend its lawful aid by the purchase of capital stock and bonds of the Iron Company, or of either of them, or by guarantee of or by an agreement

to purchase the principal and interest, or both or either, of bonds of the Iron Company; and

"WHEREAS the Trustee, being owner of the greater part of the capital stock and of the bonds of the Iron Company, desires that the credit and resources of the Iron Company shall be strengthened and increased, and that the value of its shares of capital stock and bonds shall be increased by the means and in the manner hereinafter provided, and consequently is willing to make sale of the shares of the Iron Company to the extent, in the manner and at the times hereinafter specified; and

"WHEREAS the Railway Company is engaged or interested in the business of transporting the materials for, or the products of, the Iron Company, or the iron or coal from its mines, and is directly interested in the development of the business of the Iron Company, so as to maintain a permanent supply of coal and so as to obtain and to secure a fair proportion of the traffic from and to the works and mines of the Iron Company; and

"WHEREAS under the general laws of Pennsylvania, as well as by the particular laws under which it operates, the Railway Company has lawful authority for the purposes above indicated, to acquire and to hold the stocks and bonds of the Iron Company, and as a condition of such acquisition to guarantee the payment of the principal and interest of the bonds of the Iron Company."

The agreement then proceeds to make detailed provisions for the practical and substantial guaranty of the payment of the interest upon the series of bonds and dividends upon the stock issued by the Temple Iron Company in payment for the property purchased from Simpson & Watkins, or for their purchase within a given period, at the option of the trustee. This railway agreement, a blank copy being printed in the record (page 82), is shown by the record to have been signed by the Temple Iron Company, Guar-

antee Trust Company of New York, and otherwise as follows:—

Three counterparts by Lehigh Valley Railroad Company (a corporation of Pennsylvania), by Alfred Waters, president, and attested by John R. Fanshawe, secretary, for 22 88/100 per cent.

Three counterparts by Central Railroad Company of New Jersey (a corporation of New Jersey), by J. R. Maxwell, president, and attested by Samuel Knox, secretary, for 17 12/100 per cent.

Three counterparts by Delaware, Lackawanna and Western Railroad Company (a corporation of Pennsylvania), by Samuel Sloan, president, and attested by Fred. F. Chambers, secretary, for 19 52/100 per cent.

Three counterparts by Erie Railroad Company (a corporation of New York), by E. B. Thomas, president, and attested by J. A. Middleton, secretary, for 5 84/100 per cent.

Three counterparts by New York, Susquehanna and Western Railroad Company (a corporation of New Jersey, Pennsylvania), by E. B. Thomas, president, and attested by J. A. Middleton, secretary, for 4 68/100 per cent. (Record, pages 86-86.)

IV. Between the Temple Iron Company, Guaranty Trust Company of New York, Trustee, and Reading Company, a corporation of Pennsylvania, substantially the same in form and substance as the foregoing, save in respect of the percentage of responsibility which is fixed at 29.96. (Record, page 87.)

V. Between the Guaranty Trust Company and the certain individuals named therein, collectively called the syndicate, for the purchase of $2,100,000 of the bonds owned by the Temple Iron Company in part payment to Simpson & Watkins for the property purchased from them, and $1,500,000 of an issue of certificates of interest on the like amount, the capital stock of the Temple Iron Company, deposited with the trustee under the preceding agreement.

The syndicate subscribers to take severally the proportion set opposite their respective signatures. (Record, page 91.)

The Order of the Circuit Court.

June 12th, 1903. The opinion of the Court (Lacombe, C. J.,) was filed (Record, page 832), in which it was said:—

> "There are several witnesses proceeded against, although for convenience their cases have been heard together on a single petition. Separate orders, however, should be made in each case, for each case is a separate proceeding instituted in this court against the particular individual."

In respect of the coal purchase contracts the opinion proceeds (Record, page 833):—

> "The contract, or at least one of the contracts asked for, has been produced and submitted to the court, and it does not provide, as indicated in the petition, that the 'prices paid to the seller are certain percentages of the prices for which the coal is sold at tidewater terminals.' It is entirely a contract of purchase, and does not deal at all with the subject of transportation. It fixes the price which the Lehigh Valley Coal Company is to pay the seller for coal at a certain percentage of the price at which coal of the same quality and size shall be sold during the month at a specified place. It is in no way different from a contract for the purchase of a specified number of tons of coal at a specified sum in dollars and cents, a contract made in the State of Pennsylvania, and to be completed therein by the delivery of the coal at the breakers.
>
> "Whether the Lehigh Valley Coal Company is to be considered as an independent corporation, or whether in the transaction it is to be taken as the *alter ego* of the railroad company, and the coal bought under the contract to be treated as the coal of

the railroad company, this particular contract is not relevant to the questions of reasonable rates, discriminations, &c., which were presented by the complaint.

The petition to direct the production of this contract is therefore denied.

* * * * * * *

VI.

"In the case of William G. Brown, secretary of the Philadelphia & Reading Coal and Iron Company, the motion to produce the contract is denied for the reasons given above."

* * * * * * *

VIII.

"In the case of Edgar C. Hebbard, secretary of the Guaranty Trust Company of New York, an order is asked requiring the production of several contracts referred to in the petition upon the argument as the Temple Iron Company contracts. It appears that heretofore certain coal operators and coal companies which were not owned or controlled by the defendants, being dissatisfied with the freight rates or with the manner in which the business of transportation was being conducted, came together for the purpose of building or securing the building of a new road from the coal regions where their mines were located to tide water. The defendants being unwilling to meet competition which such a new road would introduce, combined together and bought up the collieries of those who were promoting the new road. Thereupon the project of building such competing road was abandoned. The contracts in question are parts of the machinery by which this combination prevented the building of the new road. If the defendants were being prosecuted under the Sherman anti-trust Act for having entered into a combination, agreement, or

contract in restraint of trade, the contracts in question would be relevant testimony. This, however, is not a prosecution under the anti-trust Act, nor is the Interstate Commerce Commission the forum before whom such a prosecution is conducted. The contracts seem to be irrelevant to the proceeding under this complaint and the motion to require their production is denied.

IX.

"In the case of the witness, George F. Baer, the motion to require him to produce the Temple Iron Company contracts is denied."

* * * * * * *

Notwithstanding the expression in the opinion of the court to the effect that separate orders should be made in each case, "for each case is a separate proceeding instituted in this court against the particular individual," the final entry (Record, pages 836-837) is in joint consolidated form as though the appellees were joint respondents in a joint proceeding. But one joint appeal is taken and allowed. (Record, page 836.)

A joint citation was served (Record, page 842) omitting, however, E. C. Hebbard, one of the parties named in the joint order, who was not served, although the assignments of error include his case. (Record, page 840.)

I. BRIEF OF ARGUMENT.

The authority under the laws of Pennsylvania of the carrying companies who are the respondents in the proceedings before the Interstate Commerce Commission, to engage in mining or manufacturing products which may become the subject of transportation over their lines, or to hold and control the share capital of other corporations so engaged has been incidentally challenged at various points in these proceedings, and in anticipation of

a similar challenge here, the following is respecfully submitted.

As to some of these respondents, not however represented by the undersigned, their powers are derived from specific provisions of their charters, as well as from general legislation.

As to others the power is derived from various special charters and from the general law.

The following extract from the special charter of the Philadelphia and Reading Coal and Iron Company (Act of 18th June, 1871, Record, pages 117-118, Pamphlet Laws, 1871, page 915) illustrates the propositions:—

* * * * * * *

> "SEC. 5. * * * and it shall be lawful for the president and directors of said company to subscribe for and purchase the lands or stock of any other incorporated company in the State of Pennsylvania, or for any railroad or mining company of this State existing under the laws of this State to subscribe for or purchase the stock, or to purchase or guarantee the bonds of the company hereby incorporated." * * *

The general Act of April 15th, 1869 (P. L., 186) page 31, Record, page 71), is as follows:—

> "An Act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth.
>
> "SEC. 1. *Be it enacted, &c.* That it shall and may be lawful for any railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of this Commonwealth, by the purchase of their capital stock and bonds, or either of them, or by the guarantee of or agreement to purchase the principal and interest or either of such bonds: *Provided*, That this Act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill.
>
> "Approved 15th April, 1869."

Extract from charter of Reading Company:—

(Act 7th April, 1870, P. L., 1870, page 1025. Record, page 71.)

> "SEC. 3. The company hereby created shall also have the power to make purchases and sales of or investments in the bonds and securities of other companies, and to make advances of money and of credit to other companies, and to aid in like manner contractors and manufacturers, and to receive and hold, on deposit or as collateral, or otherwise, any estate or property, real or personal, including the notes, obligations, and accounts of individuals and companies, and the same to purchase, collect, adjust, and settle, and also to pledge, sell, and dispose thereof, on such terms as may be agreed on between them and the parties contracting with them; and also to endorse and guarantee the payment of the bonds and the performance of the obligations of other corporations, firms, and individuals, and to assume, become responsible for, execute, and carry out any contracts, leases, or subleases made by any company to or with any other company or companies, individuals, or firms whatsoever."

Counsel for the complainant, Hearst, and for the Interstate Commerce Commission in the Circuit Court have adverted to the supposed prohibitions contained in Section 5, article XVII, of the new Constitution of Pennsylvania, which took effect January 1st, 1874, as in some way impairing the powers vested in the companies by the previous legislation above quoted.

The constitutional provision is:—

> "ARTICLE XVII.
>
> "SEC. 5. No incorporated company, doing the business of a common carrier shall directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company, directly or indirectly, engage in any other

business than that of common carrier, or hold or acquire lands, feehold or leasehold, directly or indirectly, except as shall be necessary for carrying on its business." &c.

Purd, Dig. 12 ed. Kay and Brother, Philada., 1895, Vol. I., page 49, pl. 202.

The legislation above quoted and the charters of the various companies, as well as the acquisition by the railroad companies of the stock control of the coal companies, all antedated the new Constitution, and therefore the relations were not devised to evade or avoid the prohibitions of the Constitution made subsequently.

The decision of the Supreme Court of Pennsylvania in the case of Commonwealth vs. New York, Lake Erie and Western Railroad Company, 132, *Penna. State Reports*, 591, is regarded in that State as an authoritative declaration that ownership of the stock of coal companies under the Act of 1869, or by virtue of the special provisions of the charters themselves, cannot be treated as an evasion of the prohibition, and that consequently the acts and doings of the coal companies in the conduct of their dealings and business cannot be justly regarded as the acts of the railroad companies. The case arose under the Act of April 26th, 1855, which provides that "No corporation * * * shall hereafter acquire and hold any real estate within this Commonwealth directly in the corporate name, or by or through any trustee or any device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth, and further provided for an escheat of lands held in violation thereof." A proceeding by *quo warranto* was taken by the Commonwealth to escheat certain lands belonging to the Northwestern Mining and Exchange Company, under this Act, on the ground that inasmuch as the New York, Lake Erie and Western Railroad Company was the real owner of these lands (their ownership by the mining company being, as alleged, a mere device), and, as the railroad company was without authority to hold such lands, they were subject to escheat.

The Supreme Court held, however that as the statutes of the State authorized the holding of the stock of the mining company by the New York, Lake Erie and Western Railroad Company, such holding could not be regarded as a device to evade the provisions of the Act of 1855, and that the holding of the shares was specifically authorized by law.

It will be noted that the prohibition of this Act of 1855 is similar in substance and terms to one of the prohibitions contained in the 5th section of the 17th Article of the new Constitution.

Speaking to this point, the Supreme Court said:—

> "The object of this legislation is obvious. It was to authorize railroad and canal companies to employ their capital and credit to aid in the development of the mineral resources of the Commonwealth. Such development, as every one knows, is in many instances beyond the reach of individual enterprise. It was easy enough to form corporations with all the requisite powers for this purpose. It was a very different thing to find capitalists to take their stocks and bonds. Hence it was that the legislature gave to railroad and canal companies the power to purchase both stocks and bonds of such companies. Nor was any limitation placed upon this power. They might buy a portion or all of the stock. It probably never occurred to the legislative mind, while the purchase of a portion of the stock of a mining company would be aiding such corporation to develop the mineral resources of the State, the purchase of a majority of or the whole of the stock of such company might be held to be a 'device' to evade the Act of 1855. However that may be, the Act of 1869 was evidently intended to legalize, and perhaps encourage, railroad and canal companies to invest in this species of mining companies. It involved, necessarily, the control of such companies by the corporations making such invest-

ments, to the extent of the stock held by them. A majority of the stock controls the corporation; the corporation controls the land held by it. In this sense, and to this extent, the Act of 1869 enabled the railroad companies to control real estate, the title to which they were forbidden to hold directly or indirectly by the Act of 1855. It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation, is a very different matter from holding the title to such real estate. The one is legalized by the Act of 1869; the other is forbidden by the Act of 1855."

And in numerous cases, since the adoption of the new constitution, the Supreme Court of Pennsylvania has held that the constitution of 1874 did not *ipso facto* repeal charters, nor impair pre-existing rights and contracts.

"Charters of private corporations are left precisely as the new constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation."

Hays *vs.* Commonwealth, 82 *Pa. State*, 524.

In Penna R. R. Co. *vs.* Duncan, 111 *Pa. State*, 352, affirming Hays *vs.* Commonwealth, it is said "We also agree that the framers of the constitution of 1874, did not intend to violate the laws of the federal government, or to repeal the provisions of any charter granted by the Legislature of Pennsylvania."

"But the constitutional convention claimed for itself no such power, on the other hand it has expressly set down in (Sec. 2 of the Schedule) that all *rights*, actions, prosecutions and *contracts* shall continue as if the constitution had not been adopted. And * * * it is manifest that the convention did not intend to subject any private corporation to any of the provisions of the consti-

tution which might in any degree change the charter thereof."

Gloninger *vs.* Railroad Co., 139 Pa. State, 31.

See also—

Ahl *vs.* Rhoads, 84 Pa. State, 324;
Williamsport Pass. Ry. Co. *vs.* Williamsport, 120 Pa. State, 1, 11.

II.

The only question considered and determined by the Circuit Court was whether the testimony, oral and documentary, which the complainant sought, and the witnesses declined to supply, is relevant or material to any issue or matter lawfully before the Commission, and the Court determined they were not.

At this point these appellees desire to press upon the attention of the Court the obvious fact that, whatever might have been the situation at the beginning of their inquiry, when the questions were first raised before the Commission, the subsequent proceedings have made the questions purely academic, and of no practical importance in the determination of the case pending before the Commission.

The record shows that the Commission opened the hearing in New York April 21st, 1903, Record, page 229, and within two days, including the proceedings on the 23d, the question had been raised in respect of the documents in question, and their production had been refused.

The record shows that during the entire proceedings sample copies of all these documents were in the possession of the counsel for the complainant, and that a sample copy of one of the purchase contracts had been exhibited to the Commission.

The proceedings continued, including adjournments, as the record shows, until June 11th, a period of nearly two months, during which by the oral testimony of

various witnesses, notably that of Mr. Baer, amply quoted in the foregoing statement, the origin, history, purport, and substantial operation and effect of the coal purchase contracts, as well as of the Temple Iron Company agreements, were sufficiently shown for all practical purposes; so that if the Commission should proceed to the determination of the complaint before them, there is no matter of substance they could possibly derive from the inspection of the original papers that is not sufficiently before them in the oral testimony of the witnesses.

III.

The ground upon which the Commission and counsel mainly rely in support of their demand for the production of the coal purchase contracts seems to be that while in form they are contracts for the purchase and sale of coal, they have the practical effect of fixing or affecting the rates for transportation to be paid by the purchaser.

The chairman, in announcing the ruling on the admissibility of the first contract called for, remarked:—

> "It appears from an inspection of the contract that the prices paid by the seller are certain prices for which coal is sold at tidewater terminals. If the balance retained is less than the amounts paid the railroad company, the coal company sustains a loss in the transaction, which is hardly to be assumed. However that may be, the facts alleged to be contained in the contracts may properly be shown, we think, and we also think the contracts are competent evidence of the fact." (Record, page 298.)

The answers of the witnesses filed, under oath, in the Circuit Court, utterly refute the inference upon which the ruling is based, and the answers are abundantly supported by the testimony.

In the answer of Brown (quoted in the foregoing statement of the case, *supra*, page 8), it is said:—

"The said inferences so set forth in the opinion of the chairman of the Commission are unwarranted and unwarrantable; in fact, only a small proportion of the coal sold by the Philadelphia and Reading Coal and Iron Company reaches tidewater terminals, and only a small proportion enters into interstate commerce; that, in truth and in fact, owing to divers markets to which this coal is consigned, and the divers rates of freight to said various markets, there remains to the Coal and Iron Company, on all its transactions of the purchase of coal a large annual profit after paying full tariff rates to the railroad companies for transportation."

The testimony of Mr. Baer, above quoted, amply confirms the averments of these answers. He says (pages 19 and 20, *supra*):—

"MR. BAER:—It buys the coal at the colliery. It must take all that coal. At the end of the month it sees what has been the commercial result of that purchase. It finds as the commercial result on all the coal that it has made a profit—on all of it together—by which it is able to pay the freight and have a considerable sum in its treasury for itself to represent the reasonable profit it makes as a factor in selling coal. Now, I can readily understand if, in point of fact, these transactions resulted in a loss to the Coal and Iron Company that that might amount to a rebate which would be unlawful, but in point of fact they do not. That is one of the things you have a right to inquire into. I am speaking positively, because I have the statement carefully made up, covering the period of time when these contracts began, because I was about to enter into a new contract, the first one, I believe, I had made during my administration, and before making it—I have not made it yet—before I went into it, I wanted to be certain that the commercial feature of it was satisfactory, and I directed the accounting

officers to make up a careful statement by the month of the result to the Coal and Iron Company; and I find that the comparatively small number we have—there are only about a million tons—that we made a profit after paying full freights to the railroad companies since November 1st, 1901, of over $300,000, and there was a profit every month; $300,000 was after paying full freights and after taking out a reasonable share of the general expense of selling coal."

This statement is corroborated by the testimony of other witnesses, and is nowhere contradicted in this record, save by the argumentative deductions of counsel.

The contracts themselves show on their faces that they are confined to the sales of coal at the mines, regardless of the ultimate market to which the coal may be shipped, and regardless of the transportation charges thereon, and do not purport, in any degree, to be dependent upon the rates for transportation.

Such was the conclusion of the Circuit Court which said:—

> "It is entirely a contract of purchase, and does not deal at all with the subject of transportation" * * * "a contract made in Pennsylvania to be completed there."

If, then, the contracts do not tend to establish the rates of freight paid on coal delivered thereunder, it is clear they are not admissible in evidence on the question of rates, and have no materiality or relevancy whatever to the allegation of the complainant's attorneys that the railroad companies exact or receive less on this coal than their published rates, or that the latter are either unreasonable or discriminating. If the latter assertion was in any degree well founded in fact, the fact itself is readily susceptible to proof in the usual and orderly way by referring to the officials and books of either the carriers or shippers to show what was actually paid, hence this indirect method of approaching the subject is utterly unnecessary. The

carriers are under the supervision of the Commission as to all interstate traffic and so also are the shippers and consignees, their books, papers and accounts; from these can be obtained directly all the data required on every question raised by the complaint, whereas the contracts in question neither show the price of the coal nor the rates for transportation, nor any other fact, save that the sellers have sold the product of their mines for prices to be determined by external and comparatively remote conditions of future markets, which is utterly irrelevant, and tends to prove nothing on any point at issue.

IV.

It was contended before the Commission and before the Circuit Court that the contracts sought to be given in evidence relating to the arrangements entered into by certain of the companies, as to the purchase of the stock and the guaranty of the interest on the bonds of the Temple Iron Company were admissible, upon the theory that they tended to establish the charge against the defendant of a combination to pool freights or freight traffic in anthracite coal. It is claimed that the contracts embraced certain agreements between certain of the railroads which led to the increase of the bonds and stock of the Temple Iron Company, the contracts for their purchase and guaranty by the parties to the agreements and the use of the funds thus provided by the Temple Iron Company to purchase the control of certain mining companies, whose owners were then engaged in an effort to promote the construction of a line of railroad which if built would have diverted from the parties the coal tonnage or traffic then carried by them.

It will be observed that the purchases and guaranties provided for and consummated by these agreements were authorized by the laws of Pennsylvania, quoted above.

It cannot be pretended that by the contracts in question, any pooling of freights was directly provided for or accomplished, for the disposition of the traffic is nowhere alluded to in any of these papers.

But it was contended that the output of the companies whose control was thus acquired by the Temple Iron Company, was by some understanding to be shipped by the producing companies in some definite proportions over the lines of the railroad companies, and that this amounted to a pooling of freights by the railroad companies because these companies control the Temple Iron Company.

The evidence shows that neither the Temple Iron Company nor the companies of which it purchased the stock are shippers of coal at all. It is shown that all the coal produced by these mining companies is sold at the mines under purchase contracts similar to those which are fully discussed above.

The pooling prohibited by the "Act to Regulate Commerce" must be an agreement of carriers under which either traffic delivered for transportation to one carrier is turned over to another, in performance of an agreement to divide tonnage in agreed proportions, or, the division of the joint earnings of the carriers in agreed proportions. There is nothing here remotely resembling a pool in either form. The most that is claimed is that these parties have agreed that the tonnage shall continue to be shipped as it was before, and this is not proved, but rests solely in the surmises of counsel. Not a word to that effect appears in any of the contracts.

As, then, they do not tend to prove the existence of a pool, they are not relevant to that issue before the Commission, nor to any question of rates or discrimination.

V.

It was contended before and doubtless will be contended here in support of the relevancy and pertinency of the documentary and other evidence called for that they tend to prove the creation or existence of a monopoly or monopolies in restraint of trade between the States contrary to the so-called Anti-Trust Act.

A sufficient answer to that contention is that the proceeding before the Interstate Commerce Commission does not arise under the Sherman Act, and that the "Act to

regulate commerce" confers no authority upon the Commission to make inquiry into offenses of that nature. These inquiries are committed by law to other departments of the Government.

But even if offenses against the Sherman Act were proper subjects of inquiry in this proceeding, it is perfectly clear and plain that no one of the contracts in question in anywise affects either interstate or international commerce; the contracts are wholly subjects of internal and domestic concern and are each and all expressly authorized by the laws of the Commonwealth of Pennsylvania which has exclusive jurisdiction thereof.

United States *vs.* E. C. Knight Co. *et al.*, 156 U. S., 1.

It is respectfully submitted that the order of the Circuit Court should be in all things affirmed.

J. D. CAMPBELL,
For Appellees George F. Baer and William G. Brown.

JOHN G. JOHNSON,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

WILLIAM H. TRUESDALE, FRED F. CHAMBERS, O. C. POST ET AL.,
Appellees.

BRIEFS FOR APPELLEES.

(Revised.)

WALTER W. ROSS,
Counsel for W. H. TRUESDALE,
FRED F. CHAMBERS,
O. C. POST,
Appellees.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

WILLIAM H. TRUESDALE, FRED. F. CHAMBERS, O. C. POST,
Appellees.

BRIEF ON MOTION TO DISMISS APPEAL.

STATEMENT.

In the fall of 1902, W. R. Hearst filed a petition and complaint before the Interstate Commerce Commission against The Delaware, Lackawanna and Western Railroad Company and other railroad companies in which he alleged (Record 39) that he resided in the City of New York and was of "*necessity a purchaser of anthracite coal*," and he charged that the rates exacted for the transportation of anthracite coal from points in Pennsylvania to New York City were unreasonable and unjust; that six railroads, of which the Delaware, Lackawanna and Western was one, had entered into an agreement with each other to pool the freight revenues in anthracite coal so as to divide the same be-

tween the different lines in agreed proportions, and that the individual shippers of, and dealers in coal had been discriminated against.

The Delaware, Lackawanna and Western Railroad Company in its answer (Rec., 45), denied the petitioner's right to institute and prosecute this proceeding, also that its rates for transporting anthracite coal were unreasonable or unjust, also that it had entered into any unlawful agreement or combination with any railroad company whereby the freights on anthracite coal were pooled, or that it discriminated against any shipper of anthracite coal.

Upon the *ex parte* application of the complainant to the Interstate Commerce Commission in April, 1903, subpœnas *duces tecum* were issued by the Commission and afterwards served upon W. H. Truesdale and F. F. Chambers, requiring each of them to produce all contracts for the purchase or transportation of anthracite coal entered into since January 1, 1901, between the Delaware, Lackawanna and Western Railroad Company and any and all producers of anthracite coal or owners or operators of anthracite coal mines (Record, 54, 55 and 56). Later a subpœna *duces tecum* was served upon O. C. Post.

In response to these subpœnas these appellees appeared before the Commission and testified.

It was admitted before the Commission that the Delaware, Lackawanna and Western Railroad Company had entered into five agreements with five independent operators located upon its line of railroad in the State of Pennsylvania for the purchase of anthracite coal. At the hearing before the Commission, counsel for the complainant Hearst requested witness Fred F. Chambers, as secretary of the Delaware, Lackawanna and Western Railroad Company, to produce said contracts before the Commission inorder that he might offer them in evidence, and make them a part of the record in the matter under consideration by the Commission. Counsel for appellee objected to

the production of the contracts in question for the reasons that they were in no way pertinent, relevant or material to the inquiry before the Commission; they were purely and simply contracts for the purchase of coal by the railroad company in the State of Pennsylvania, where they were made and wholly performed; they related in no way to the transportation of coal; they were contracts made between citizens of Pennsylvania and wholly performed within that State, and the Interstate Commerce Commission was without authority or jurisdiction to inquire into such matters which did not relate to interstate commerce; that the contracts were made between the railroad company and persons who were not parties in the proceeding before the Commission. It also showed that under its charter and the laws of Pennsylvania it was authorized to buy and sell coal, which was admitted. The objections were overruled and the witness was directed by the Commission to produce the contracts. Acting upon the advice of counsel he declined to do so.

Appellee Post, as general auditor of The Dela ware, Lackawanna and Western Railroad Company, was requested by counsel for complainant Hearst to produce before the Commission the vouchers which showed the amounts paid by the railroad company for the coal purchased under the five contracts above referred to. The above objections were also made to the production of the vouchers, but were overruled by the Commission and appellee Post was directed to produce the vouchers. Acting upon the advice of counsel he declined to do so. The vouchers in question were desired merely to show the amount paid by the railroad company to the parties to said agreements for their coal.

Appellee, William H. Truesdale, as president of The Delaware, Lackawanna and Western Railroad Company, was asked certain questions, hereinafter referred to, which pertained to

producing, buying and selling coal by The Delaware, Lackawanna and Western Railroad Company. Counsel for appellee urged the same objections above referred to, which were overruled, and appellee was directed to answer the questions, but acting upon the advice of counsel declined to do so.

Whereupon the Interstate Commerce Commission filed its petition in the Circuit Court of the United States for the Southern District of New York, praying that the witnesses be ordered to produce before the Commission the contracts and vouchers referred to, and that they be required to make full answer to each of the questions referred to. Appellee Chambers appeared and filed his answer (Record, 216), in which he stated that he was the secretary of The Delaware, Lackawanna and Western Railroad Company, which was a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, that under and by virtue of its charter and the laws of said Commonwealth of Pennsylvania it is authorized, among other things, to own and operate railroads, to transport persons and property and to own and operate coal mines and property incident thereto, and to buy and sell coal; and to acquire and hold or guarantee stocks and bonds of other corporations.

He alleged that the application made by the complainant Hearst before the Interstate Commerce Commission for the issuance of a subpœna *duces tecum* to produce the contract in question was *ex parte*, and that no notice was given to him or to said corporation of said application, and that he had no opportunity to appear before the Interstate Commerce Commission to state his reasons why said subpœna *duces tecum* should not be issued. He offered to produce for the inspection of the Court the contracts made by The Delaware, Lackawanna and Western Railroad Company with persons other than the complainant for the purchase of coal, but he objected to and protested against the produc-

tion of said contracts before said Commission at said hearing, and he alleged:

FIRST.—The Delaware, Lackawanna and Western Railroad Company is a Pennsylvania corporation, and authorized by its charter and the laws of that commonwealth, among other things, to buy and sell coal; that it had entered into five certain contracts with certain of the owners of coal mines along its line of railroad within the State of Pennsylvania for the purchose of certain of the coal from the owners thereof; that none of the corporations or persons with whom the railroad company had entered into contracts for the purchase of coal were parties to the hearing before the Commission; that said parties have rights in such contracts; that they would have the right to object to the contracts being produced and made a part of a public record, if they, themselves, were present before the Commission, and the fact that they were not parties before the Commission should not be taken advantage of by the Commission or by the Court, and the private business of persons who are not before the Commission should not be inquired into without their consent.

SECOND.—That said contracts were made by and between citizens of the Commonwealth of Pennsylvania, and were wholly local and domestic contracts, made and performable within the Commonwealth of Pennsylvania, and did not relate to commerce between states or foreign nations. That said contracts and the performance thereof were wholly of local cognizance, and were without the jurisdiction of the Interstate Commerce Commission and they could not be lawfully inquired into in this proceeding.

THIRD.—That said contracts were irrelevant, incompetent and immaterial to the inquiry before the Interstate Commerce Commission on the complaint of said W. R. Hearst.

The appellee further answered that he was ready and willing to appear before the Commission and to answer any questions within his knowledge bearing upon or relating to the relations of said company as a carrier of interstate traffic within the lawful jurisdiction of the Interstate Commerce Commission, but that he respectfully objected to this inquiry of said Commission into the business of said company of mining and selling coal for the reason that it was not within the cognizance of said Commission to make such inquiry. That he was advised and so charged that in case it should be held that said act to regulate commerce conferred upon the Interstate Commerce Commission power to require by subpœna or otherwise, the attendance and testimony of witnesses and the production of books, papers, tariffs and contracts not directly and solely relating to matters under investigation pursuant to the provisions of said act, that then the Court should hold that the said act was unconstitutional, null and void.

The answer of O. C. Post, general auditor of The Delaware, Lackawanna and Western Railroad Company, is found on page 219 of the record, and is similar to that of Fred F. Chambers. The answer of William H Truesdale, president of the said company, is found on page 95 of the record, and is also similar to the answer of Fred F. Chambers.

At the hearing of the matter before the United States Circuit Court the five contracts in question were submitted to the inspection of the Court as offered in the above answer (Record, 831).

The petition of Hearst before the Commission alleged only that he " was of necessity a purchaser of coal." There is no evidence in this record of nearly one thousand pages to sustain even this allegation. He was not a shipper of coal burdened with unjust rates for transportation; none of the seventy-five to one hundred so-called individual anthracite coal operators with mines on the railroads joined with him in his petition, or made any complaint (Rec. 760);

he did not show that he was even a seller of coal—just a seller of newspapers.

The Commission was not conducting a general investigation into the conduct of the business of transportation by the carriers; it was hearing the evidence which pertained to the issues defined by the verified complaint of Hearst and the answers thereto. The witnesses did not refuse to answer any questions propounded by the Commission, counsel only advised the witnesses to refuse to answer irrelevant questions propounded by counsel for Hearst; and counsel offered to withdraw objections to the question if any member of the Commission desired to ask the question (Rec., 679).

The Circuit Court held (Record, 832) that it should follow the decision of the Supreme Court in the Brimson case, and upon application for such an order it did not sit as an appellate tribunal, but should decide all questions raised as to relevancy of testimony as if such questions were raised before it in the first instance, and the Court said:

"There are several witnesses *proceeded* against and that for convenience their cases have been heard on a single petition. Separate orders, however, should be made in each case, *for each case is a separate proceeding instituted in this Court against the particular individual.*"

"Among the objections advanced to the granting of the petition it is contended that the Interstate Commerce Commission has no jurisdiction to hear the complaint for the reason that the complainant is not himself a shipper of coal. It was contended in opposition that the Commission is conducting a general investigation into the conduct of the business of transportation by the defendant carriers, which it has a right to do under the statutes independent of any complaint by a person aggrieved. The record, however, does not sustain the proposition. The proceedings before the Commission were *begun by the service of a formal verified complaint,*

to which *separate answers were interposed by the several defendants;* the petition presented to this Court avers that the refusals to produce documents and answer questions took place in the course of '*a hearing upon said complaint*' which the Commission had duly ordered; the prosecution of the complaint before the Commission is being conducted --as it is most appropriate that such prosecution should be—by the counsel for the complainant.

"In view of the language of the Interstate Commerce act there is great force in the contention that the prosecution before the Interstate Commerce Commission of carriers who violate the statutes should be at the instance of a shipper, and that an individual who merely purchases merchandise, the price of which is advanced by reason of its including the cost of transportation from the place of production to the place of sale, *may not institute and prosecute such a proceeding where no shipper raises any objections to the rates charged.* In view of the other grounds of objection which have been interposed, however, it will not be necessary to decide this question."

In deciding upon the admissibility of the contracts in question the Court said: "*It is entirely a contract of purchase, and does not deal at all with the subject of transportation.* It fixes the price which the Lehigh Valley Coal Company is to pay the seller for coal at a certain percentage of the price at which coal of the same quality and size shall be sold during the month at a specified place. It is in no way different from a contract for the purchase of a specified number of tons of coal at a specified sum in dollars and cents, a contract made in the State of Pennsylvania and to be completed therein by the delivery of the coal at the breakers. * * * The petition to direct the production of this contract is denied" (Rec., 833–4).

The Court further said: "In the case of Fred F. Chambers, secretary of the Delaware, Lackawanna and Western R. R. Company, the contracts referred

to have been submitted to the Court, and, as in the other case, they appear to be all contracts of purchase only. The order to produce is therefore denied" (Record, 834).

"In the case of Orlando C. Post, general auditor of the Delaware, Lackawanna and Western Railroad Company, it appears that the original vouchers asked for show the transactions for the purchase of coal under the contract last referred to, and contain no information whatsoever on the subject of transportation. The motion to require their production is denied" (Record, 834).

The only question which the Court held should be answered by William H. Truesdale (Record, 835) was afterwards withdrawn by the counsel of complainant (Record, 837).

Thereupon the Interstate Commerce Commission prayed an appeal to the Supreme Court of the United States from the order of the Circuit Court entered dismissing their petition (Record, 838), and among their assignments of error we find (Record, 839) the dismissal of the petition of the Commission for an order requiring Fred F. Chambers, secretary of the railroad company to produce the contracts above referred to, and for an order requiring O. C. Post to produce the vouchers in question and for an order requiring William H. Truesdale to answer the following questions:

"Who sells your coal on commission?"

"You maintain a sales department of your own at the City of New York, don't you?"

"Do you consider that twenty cents a ton commission that you have charged here against the cost and expense of mining is a fair and reasonable charge for commissions?" "Do you sell anthracite coal at tidewater?"

"What is the price of coal to-day sold by the Delaware, Lackawanna and Western at tidewater?" "What has happened to make the advance? Has there been any change that you know of in the supply of coal since yesterday?"

"Have you observed any change in the demand for coal since yesterday?"

"Has the cost of producing coal gone up any since yesterday?"

"Who fixes the price of Delaware, Lackawanna and Western coal at tidewater?"

"How do you account for the fact that the price circulars are uniform, if there is no agreement?"

"Don't you know, from your experience and knowledge of the business, that the increase in wages will not make a difference of over fifteen cents a ton in the cost of producing anthracite coal?" (Rec., 835–6.)

This proceeding of the Interstate Commerce Commission was instituted under the amendment to Section Twelve of the "Act to regulate Commerce," passed February 10, 1891 (Supp. U. S. R, S., p. 891), which provides "* * * upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all *necessary proceedings* for the enforcement of the provisions of this act * * * and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents *relating to any matter under investigation* * * * And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question."

The Circuit Court found that the above evidence

did not relate to the matter under investigation as defined by the complaint of Hearst and the answers thereto, and dismissed the petition of the Commission, from which order this appeal is taken.

BRIEF.

The first question which arises is—has this Court jurisdiction to inquire whether the Circuit Court erred in holding that the above evidence was irrelevant?

In a proceeding of this kind by the Commission against witnesses to compel them to give evidence requested by a complainant, does an appeal from the Circuit Court lie only to the Supreme Court?

No constitutional question is involved here as in the Brimson case, 154 United States, 447.

This direct appeal is not authorized under Section 5 of the Act of March 3, 1891, for the question of the jurisdiction of the Circuit Court is not involved nor is the constitutionality of any law of the United States drawn in question, nor is the constitution or law of a state claimed to be in contravention of the Constitution of the United States.

No question of the jurisdiction of the Circuit Court has been certified to this Court. No construction or application of the Constitution can be said to have been involved in the judgment below, nor did the Circuit Court construe the Constitution, nor was it requested to construe it. Cornell *vs.* Green, 163 U. S., 78. In Ansbro *vs.* U. S., 159 U. S., 698, this Court said: "It is only when the constitutionality of a law of the United States is drawn in question, not incidentally, *but necessarily and directly*, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon so as to give jurisdiction to this

Court under the fifth section of the Act of March 3, 1891."

See also

Lampasas *vs.* Bell, 180 U. S., 276.
Muse *vs.* Arlington Hotel Co., 168 U. S., 430.
Carey *vs.* Houston & Texas Central Ry., 150 U. S., 170.
Defiance Water Company *vs.* Defiance, 191 U. S., 184.
Arbuckle *vs.* Blackburn, 191 U. S., 405.

It being determined that the appeal was improperly taken by appellant to this Court under the acts prior to 1903, the question then arises:

Is this direct appeal to the Supreme Court authorized by either or both the acts of February 11, 1903, and of February 19, 1903?

Section 3 of the act of February 19, 1903, entitled, "An Act to *further* regulate commerce with foreign nations and among States," Vol. 32, United States Statutes at Large, page 848, provides "that whenever the Interstate Commerce Commission shall have reasonable ground for belief that any *common carrier* is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction. * * * It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings. * * * And in proceedings under this Act and the acts to regulate commerce, the said courts shall have the power to compel the attendance of witnesses both upon the part of *the carrier and the shipper.* * * *

"Provided, That the provisions of an Act entitled

An Act to expedite the hearing and determination of *suits in equity* pending or hereafter brought under the Act of July 2, eighteen hundred and ninety, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February 11, 1903, shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

The Act of February 11, 1903, found in the same volume, page 823, provides, "That in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the Act entitled, 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety. 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the Clerk of such Court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such Clerk to each of the Circuit Judges of the Circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the Circuit Judges of said Circuit, if there be three or more; and if there be not more than two Circuit Judges, then before them and such District Judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

Section 2. That in every suit in equity pending or hereafter brought in any Circuit Court of the

United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: Provided, that in any case where an appeal may have been taken from the final decree of a Circuit Court to the Circuit Court of Appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

It is necessary for this Court in construing these acts to determine whether Congress intended that any proceeding prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission an appeal from the order of the Circuit Court would lie only to the Supreme Court.

In Ogden *v.* Saunders, 25 U. S., 331, Chief Justice Marshall said concerning the principles of construction which ought to be applied to the Constitution of the United States:

"To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary."

Chief Justice Fuller said in Petri *v.* Commercial National Bank of Chicago, 142 U. S., 650:

"The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled; and it is also held that it is the duty of the Court to ascertain the

meaning of the Legislature from the words used and the subject matter to which the statute relates, and to restrain its operation within narrower limits than its words import if the Court is satisfied that the literal meaning of its language would extend to cases which the Legislature never intended to include in it."

Mr. Justice Peckham said in McKee *v.* United States, 164 U. S., 293:

"But we think a perusal of the whole act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole act. Under such circumstances it is not only the right, but it is the plain duty, of the Court to limit by a proper construction the otherwise boundless application of the general language used in the statute."

Mr. Justice Brewer said, in Smith *v.* Townsend, 148 U. S., 494:

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy." * * *

"In United States *v.* Union Pac. R. Co., 91 U. S., 72, 79, it was said that 'courts, in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it Aldridge *v.* Williams, 46 U. S., 3 How., 24; Preston *v.* Browder, 14 U. S., 1 Wheat., 120.' And in Platt *v.* Union Pac. R. Co., 99 U. S., 48, 64, that, 'in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at

things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.'"

Mr. Justice Shiras, in Van Patten *v.* Chicago, M. & St. P. Ry. Co., 81 Fed. Rep., 547, said:

"The intent of Congress is to be gathered from a consideration of the entire act, and not solely from detached portions thereof, and the familiar rule of construction is to be followed, to wit, that, in determining the meaning of the words employed, the general purpose of the act and the evil sought to be remedied must be always kept in mind, and, furthermore, parts of the act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose."

In Smythe *v.* Fiske, 23 Wall., 374, 380, this Court said: "A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law." And in Lau Ow-Bew *v.* The United States, 144 U. S., 47, 59, "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Let us apply these principles to the statutes in question.

The Act of February 19, 1903, as shown by its title, is "An Act to *further* regulate commerce with foreign nations and among States." It specifically provides "that whenever the Interstate Commerce Commission shall have reasonable ground for belief that any *common carrier* is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file,

or is committing any discrimination forbidden by law, a petition may be presented alleging SUCH FACTS to the Circuit Court of the United States sitting in equity."

It provides for a new class of actions, *suits in equity*, brought by the Interstate Commerce Commission against common carriers to prevent them from transporting passengers or property "at less than published rates on file," or "committing any discrimination forbidden by law." The petition to the Circuit Court must "*alleye such facts.*" Such are an important class of cases, their results are far-reaching, frequently the business of the public is materially affected, and it was the purpose—the intention of Congress that a suit in equity in which was involved "*such facts*"—"*discriminations forbidden by law*"—should be speedily determined and should have priority over other litigations because of its public nature, and in order to accomplish this object Congress added a proviso to this act that "any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission" should come within the provisions of the act to expedite the hearing and determination of certain suits in equity.

Congress had under consideration at that time the question of expediting the determination of an important class of cases, and when it used the word "case" in the proviso it intended to provide only for suits in equity in which were involved the questions of *discriminations on the part of carriers as provided in the body of the act.*

It was not the intention of Congress, nor do the words of the Act provide, that a proceeding by the Commission against recalcitrant *witnesses* (not carriers) should have priority over important litigation, and that the appeal by the Commission from an adverse decision of the Circuit Court should lie only to the Supreme Court.

This proceeding is not authorized by either of the Acts of February, 1903; it was instituted and prose-

cuted under the amendment to Section 12 of February 10, 1891, of the act to regulate commerce.

The provisions of the act of February 19, 1903, in no way apply to this proceeding.

The provisions of the Acts are entirely different.

The Act of February 10, 1891 (*supra*), provides specifically for the character of proceedings which were instituted in the Circuit Court on behalf of the Commission and Hearst. An appeal from an order, as in the matter under consideration, would lie only to the Circuit Court of Appeals under the provisions of the Evarts Act.

The provisions of the Act of February 10, 1891, in no manner conflict with the provisions of the Act of February 19, 1903, and no portion of it is repealed.

The one provides for "necessary proceedings" against witnesses; the other provides for an important class of suits in equity against "common carriers." When Congress used the word "case" in the proviso, it meant suit in equity brought against a common carrier by the Commission to prevent discrimination, as described in the body of the act.

It must be borne in mind that the sole question which the Circuit Court was called upon to decide in this proceeding was whether certain evidence was relevant to the matter under investigation on the petition of Hearst before the Commission. The petition of the Commission in the Circuit Court was in the nature of a collateral proceeding to the complaint of Hearst then pending before it. It was not a suit in equity to enforce a right or redress a wrong, public or private, or to remedy the wrongs specifically described in the Act of February 19, 1903.

If Congress had intended to place the burden upon this Court of reviewing proceedings of this kind, it undoubtedly would have said so in plain language.

The reviewing of questions of relevancy of evidence is largely a matter of detail work, and it was for the purpose of relieving this Court of such work, and that it might devote itself to the per-

formance of more important duties, that Congress passed the Act of March 3, 1891, commonly known as the "Evarts Act."

This Court said in the case of McLish *v.* Roff, 141 U. S., 665, in construing the Act of March 3, 1891:

"It is a matter of public history, and is manifest on the face of that act, that its primary object was to facilitate the prompt disposition of cases in the Supreme Court, and to relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations."

This proceeding was instituted in the Circuit Court under the Act of February 10, 1891; an appeal, if prosecuted, should have been taken to the Circuit Court of Appeals under the Evarts Act. The provisions of the Act of February 19, 1903, do not apply to a proceeding of this kind, and neither the Act of February 10, nor March 3, 1891, were repealed thereby.

The motion to dismiss the appeal should be granted.

Interstate Commerce Commission *v.* Atchison, &c., R. Co., 149 U. S., 264.

This Court being without jurisdiction to inquire whether the Circuit Court erred in holding that the evidence sought by the Interstate Commerce Commission at the request of Hearst was irrelevant, the appeal should be dismissed.

Walter H. Ross
Counsel etc

BRIEF ON THE MERITS.

I.

CIRCUMSTANCES OF THE REFUSALS.

The Interstate Commerce Commission filed its petition in the Circuit Court in which it alleged that W. R. Hearst had filed a complaint against certain railroad companies which the companies had answered. It attached to its petition a copy of the complaint and the answers, and further alleged that during the hearing upon said complaint the counsel for complainant requested certain witnesses to produce certain papers and documents and to answer certain questions which they had declined to do for the reasons above set forth. The purpose of the petition was to invoke the aid of the Court in requiring the testimony of the recalcitrant witnesses and the production of the books, papers and documents (Rec. pp. 2–38).

The complaint of Hearst alleged that he was a resident of the City of New York, and was "of necessity a purchaser of anthracite coal"; and that unless the relief sought in his petition was granted that he and thousands of other persons similarly situated and independent producers of anthracite coal would sustain irreparable injury. He then alleged that the railroad companies were charging unreasonable and unjust rates for transporting coal from points in the anthracite coal region to the seaboard; that the said railroad companies were engaged in pooling the freights on anthracite coal; and further, that the independent producers and dealers in coal were being discrimi-

nated against. The prayer of his petition was that the defendants be required to make full answer to the foregoing charges, and that orders be entered commanding each of the defendants to refrain from the said violations of the act to regulate commerce (Rec., 39–41).

Although complainant Hearst consumed several weeks of the time of the Commission and of defendants, at considerable cost and expense to defendants, and although the evidence which he produced comprises nearly one thousand pages of this record, yet he did not personally appear before the Commission, nor did he show that he was even a purchaser of anthracite coal; nor did any of the seventy-five to one hundred so-called individual producers of anthracite coal (Rec., 760) appear before the Commission, or in any way join with him in producing evidence before the Commission of any of the alleged unlawful violations of the act to regulate commerce.

He was satisfied to call to the witness stand, primarily, prominent officials of the defendant railroad companies whose testimony, when published in his newspapers, might interest his readers and possibly aid in the sale of his newspapers.

The Commission itself was not conducting an investigation; it was simply hearing the complaint of Hearst, presumably to make reparation of any wrongs the complainant might show he had sustained.

But what wrong could he sustain under the allegations of his petition, and what reparation was it possible for the Commission to make, acting within the lawful powers conferred upon it by Congress?

It was under these circumstances that counsel advised the appellees to refuse to answer the questions referred to, or to produce the contracts and papers which were in their charge, as officers of the railroad company.

II.

THE CIRCUIT COURT DID NOT ERR IN DENYING THE MOTION OF THE COMMISSION TO REQUIRE THE WITNESSES TO PRODUCE THE FIVE PURCHASE CONTRACTS WHICH THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY HAD ENTERED INTO WITH CERTAIN OWNERS OF COAL MINES ADJACENT TO ITS RAILROAD IN THE STATE OF PENNSYLVANIA, OR THE VOUCHERS, OR TO ANSWER THE IRRELEVANT QUESTIONS.

Appellee Chambers was within his lawful rights in refusing to produce the five contracts in question. These contracts were submitted to the Circuit Court for its inspection, and are likewise tendered to this Court, and the Court held that the agreements contained in said contracts did not pertain to the subject of transportation; that they provided for the purchase of coal, were made in the State of Pennsylvania and performed therein by the delivery of the coal at the breakers.

These agreements show they were made between citizens of the State of Pennsylvania, and some are renewals of agreements made more than twenty years ago. Some provide for the sale of a portion of the output of the collieries, and others of the entire output of the collieries, to the railroad company. The contracts also show that the price which the railroad company is to pay the seller for coal is fixed at a certain percentage of the price at which coal of the same quality and size shall be sold during the month at a specified place. As said by the Circuit Court in its opinion, "It is in no way different from a contract for the purchase of a specified number of tons of coal at a specified sum in dollars and cents."

What interest did Hearst have in these contracts? What was the source of his right to inspect them, or to publish them in his newspapers? None of the parties to these agreements were complaining or seeking to have them set aside as being illegal or *ultra vires* contracts. Is there any justification for his assumption of the rôle of protector? Has he the right to assume the prerogatives of the Attorney-General of the United States and attempt in this proceeding before the Interstate Commerce Commission to enforce the provisions of the Sherman Anti-Trust Act, and have these contracts declared void because they are in unlawful restraint of trade? As was very aptly remarked by Judge Lacombe: "This, however, is not a prosecution under the Anti-Trust Act, nor is the Interstate Commerce Commission the forum before whom such a prosecution is conducted."

These contracts made between citizens of the State of Pennsylvania are private, and the parties thereto are entitled to the protection guaranteed by the Constitution at least until they have been charged in the proper forum with having violated some law of the land.

It is elementary that the complainant Hearst having no interest in these contracts has no right to demand their production.

Greenleaf, on Evidence, says (Sec. 298): "It is necessary that the plaintiff, in order to be entitled to the production of documents, *should either have a right to the documents themselves*, or a sufficient interest in inspecting them. And this right must appear in his bill, and cannot, regularly, be established by collateral proof."

In 1890, John C. Haddock, a producer and shipper of coal, filed a complaint against The Delaware, Lackawanna and Western Railroad Company before the Interstate Commerce Commission and applied to the Commission for a subpœna *duces tecum* requiring the Railroad Company to produce certain contracts which it had for the purchase of coal of others than the complainant

Haddock. A hearing was had upon the application. Mr. Justice Cooley, then chairman of the Commission denied the application and said:

"By its motion for subpœnas *duces tecum* complainant is understood to desire to obtain, as instruments of evidence, among other things, certain contracts for the sale of coal made between respondent and third parties. If such contracts were put in evidence they might show, perhaps, what respondent is receiving for its coal at some of the points of delivery. * * * But we do not think that complainant is entitled to call for the contracts themselves for this purpose. Third persons have rights in such contracts. They would have a right to object to the contracts being produced if they themselves were present before us at the hearing, but they can certainly lose no rights by reason of being strangers to the proceedings and not present. There may, for aught we know, be matters in their contracts with which neither this complainant nor any other individual of the public has any concern whatever or any business to inquire into. We do not know that such is the case, but we do know for the purpose of ascertaining the selling price of coal it is not necessary that the production of the contracts be required, and also, as has been said, that parties interested in them, and who are not here to consent to their being produced, might rightfully object if they were here" (Vol. IV., I. C. C. R., 322).

In the case of the Interstate Commerce Commission v. Brimson, 154 U. S., p. 478, Mr. Justice Harlan said:

"We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of

making inquiry into the private affairs of the citizen (Kilbourne *v.* Thompson, 103 U. S., 168, 190). We said in Boyd *v.* United States, 116 U. S., 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field *in re* Pacific R. Commission, 32 Fed. Rep., 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely the protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.'

"It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate Interstate Commerce does not carry with it any power to destroy or impair those guarantees. This Court has already spoken fully upon that general subject in Counselman *v.* Hitchcock, 142 U. S., 547. We need not add anything to what has been there said. Suffice it in the present case to say, that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks upon grounds distinctly set forth, an order to compel appellees to answer particular questions and produce certain books, papers, &c., in their possession, *it was open to each of them to contend before that Court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, &c., ordered to be produced; or that neither the questions propounded nor the books,*

papers, &c., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the Court below the petition of the Commission could have been dismissed upon its merits."

And Mr. Justice Brewer, in his dissenting opinion in the same case (155 U. S., 1) said:

"It must be borne in mind that this is purely and solely a proceeding brought for contempt. No action is pending in the Court to enforce a right or redress a wrong, public or private. No inquiry is being carried on in it with a view to the punishment of crime, nothing sought to be done for the perpetuation of testimony or in aid of any judicial proceeding."

III.

The vouchers in the custody of appellee Post, the general auditor of the railroad company, which counsel for complainant Hearst requested him to produce before the Commission, merely showed the amount paid for the coal purchased under the above contracts, and were held by the Circuit Court to contain no information whatsoever on the subject of transportation, and the motion to require their production was denied.

If the ruling was right as to the production of the contracts it was also right as to the production of the vouchers. The same principles apply to both, and it is unnecessary to reiterate them.

IV.

The Circuit Court denied the motion to require appellee Truesdale, President of The Delaware, Lackawanna and Western Railroad Company, to answer the questions pertaining to the sale and cost of the production of coal (*supra*, 9, 10; Rec. 835–6).

He declined to answer these questions under advice of counsel, who objected on the grounds that the questions were not relevant, &c. (*supra*, 4, 5, 6).

The Delaware, Lackawanna and Western Railroad Company was incorporated about seventy-two years ago under special acts of the Commonwealth of Pennsylvania. The Commonwealth granted it unusual privileges; the privilege not only of a carrier of passengers and property, but also the right to own coal lands and to engage in the mining, buying and selling of coal, and to hold stocks and bonds in other companies.[1]

Undoubtedly the reason the Legislature granted it the right to engage in the coal mining business was the desire of the Legislature to encourage the development of the mineral resources of the Commonwealth, which were then dormant.

When the railroad company entered into the contracts above referred to for the purchase of certain coal from the owners thereof situated upon its line of railroad in the Commonwealth of Pennsylvania, it was acting entirely within its corporate powers. The coal which it purchased from the owners thereof under said agreements was delivered to the railroad company at the breakers in the Commonwealth of Pennsylvania and then became the personal property of the railroad company. Undoubtedly, much of said coal was used by the railroad company in its shops, stations, on its engines and trains, in the conduct of its business in Pennsylvania and elsewhere.

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[1] Laws of Pennsylvania, 1832, p. 316; Laws of Pennsylvania, 1849, p. 649; Laws of Pennsylvania, 1855, p. 110; Laws of Pennsylvania, 1869, p. 31, Etc.

In what respect can it be said that the provisions of the contracts in question governing the purchase of certain coal by the railroad company, or the amount paid for said coal as shown by the vouchers referred to, or the questions as to the price, or cost of producing of coal, were relevant to the issues raised in the complaint of Hearst before the Commission, which were—the reasonableness of the rates for transporting coal to tide-water; the maintenance of a pool for the division of revenues derived from transporting the coal; and unjust discrimination against independent producers of coal?

Hearst did not offer even a scintilla of evidence to the effect that there was any pooling of the freight revenues, nor did he bring before the Commission a single producer or shipper of coal to complain of unjust discrimination.

Complainant Hearst having alleged (but not proven) that he was of necessity a purchaser of anthracite coal, and having failed to show that he was a shipper of coal, the only possible relief he could obtain under his complaint would be an order from the Commission commanding the defendant Company to reduce the price of its coal to Mr. Hearst. Clearly it is not within the jurisdiction of the Interstate Commerce Commission to grant such relief.

V.

COMPLAINANT HEARST CONFUSED THE PROVISIONS OF THE ACT TO REGULATE COMMERCE WITH THE PROVISIONS OF THE ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINT AND MONOPOLIES.

The jurisdiction of the Interstate Commerce Commission is limited by the provisions of the act, and

the amendments and supplements thereto, by which it was created; under these provisions the range of inquiry of the commission is limited to the questions of interstate transportation by railroads. The range of inquiry granted by Congress to the commission is much narrower than that granted under the provisions of the Sherman Anti-Trust Act, and counsel for complainant Hearst, in his proceeding before the commission, was evidently confused in his interpretation of these acts. It is clear that he was attempting to proceed under the provisions of both the Acts; this is shown in the opening remarks of Mr. Shearn, counsel for Mr. Hearst, before the Interstate Commerce Commission, as follows:

(Rec. 237, 238):

"Then it was that Mr. Hearst turned to this forum, recollecting its non-partisan character; recollecting something of its history; recollecting what it had to do with the institution of every proceeding that has taken place under the Sherman anti-trust law that has amounted to anything, and that it has had its initiative before this Commission; recollecting what happened in the beef merger case and in the Northern Pacific case, and we have come here and shall lay before this Commission the evidence we have gathered establishing the facts that I have been discussing and establishing, I believe, the existence of a hard-and-fast combination between at least six of these coal carriers, whereby there is no competition in either the production, transportation, or sale of anthracite coal."

If it is true that a combination in restraint of trade exists, to which The Delaware, Lackawanna and Western Railroad Company, or any of its officers, are parties, Congress, in the exercise of its power to regulate commerce between States, has fully provided for the emergency, and the provisions of the Sherman Anti-Trust Act will undoubtedly remedy

the evil through the power of the Department of Justice.

But this, as said by Judge Lacombe, is not such a proceeding.

We will meet that issue when the charge is preferred in the proper forum.

VI.

THE JURISDICTION OF THE COMMISSION.

The jurisdiction of the Interstate Commerce Commission is defined in the act to regulate commerce (Vol. 1, Sup. R. S. of U. S., 529);

"That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, *for a continuous carriage or shipment*, from one State * * * to another State * * *. and also to *the transportation* in like manner of property shipped from any place in the United States to a foreign country. * * * Provided, however, that the provisions of this Act shall not apply to the *transportation* of passengers or property, or to the receiving, delivering, storage or handling of property *wholly within one State*, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

Mr. Justice Brewer said in Interstate Commerce Commission *v.* C. N. O. & T. P. Ry. Co., 167 U. S., 506, in speaking of the functions of the Commission:

"It is charged with the duty of seeing that there is no violation of the long and short haul clause;

that there is no discrimination between individual shippers, and nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right which is the great purpose of the Interstate Commerce Act shall be secured by *all shippers.*"

And, again, in the same case the language of Mr. Justice Jackson was adopted as follows:

"'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

In United States *v.* Freight Association, 166 U. S., 357-8, Mr. Justice White said: "The statute, commonly known as the Interstate Commerce Act, was a special act, and *it was intended to regulate interstate commerce transported by railway carriers. All* its provisions, directly and expressly, related to this subject." * * * "That act was the initiation of a policy by Congress looking to the development and working out of a harmonious system to regulate the highly important subject of interstate *transportation*" * * * (370). "It cannot be questioned that the Interstate Commerce Act was intended by Congress to inaugurate a new policy for the purpose of reasonably controlling interstate commerce rates and the dealings of carriers with reference to such rates."

The contracts in question contained agreements only for the purchase of coal—not for its transportation from one State to another.

There can be no reasonable doubt that a contract made between citizens of the State of Pennsylvania which provides that the owner will sell a part or all of the coal which he digs from his mines to the purchaser at a certain price and the coal is delivered by the seller to the purchaser at the mines in the State of Pennsylvania is wholly a domestic transaction and governed exclusively by the domestic law, if such law is not in conflict with the Constitution of the United States. The coal which is the subject of the contract is a part of the general mass of property of that State and subject to its jurisdiction.

The purchase of the coal at the mines was a domestic transaction and subject exclusively to the laws of Pennsylvania, and the Interstate Commerce Commission exceeded its jurisdiction when it directed the witnesses, at the request of Hearst, to produce such contracts for his inspection, or when it directed the witnesses to produce papers showing the cost of such coal, or to answer questions as to the cost of producing coal or selling it.

When, however, the coal started on its "final movement for transportation" from Pennsylvania to New Jersey—or any other State—*the rate charged for its transportation* became a proper subject of inquiry before the Commission, under proper circumstances. The witnesses did not refuse to give any evidence on that subject.

But when the coal arrived at its destination in another State it forthwith became intermingled with the property of such State and subject to its jurisdiction, and the Commission was without jurisdiction to require the witnesses to answer questions as to the selling price of coal.

These principles are firmly established by the decisions of this Court:

Brown *v.* Huston, 114 U. S., 622.
Pittsburg Coal Co. *v.* Betz, 156 U. S., 577.

Coe *v.* Errol, 116 U. S., 517.
Hopkins *v.* United States, 171 U. S., 578.
United States *v.* Knight, 156 U. S., 1.
Kelly *v.* Rhoads, 188 U. S., 1.
Diamond Match Co. *v.* Ontonagon, 188 U. S., 82.

Mr. Justice Brown said in Kelley *v.* Rhoads, 188 U. S., page 5:

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities (State, Detmold, Prosecutor, *v.* Engle, 34 N. J. L., 425; Standard Oil Co. *v.* Bachelor, 89 Ind., 1; Burlington Lumber Co. *v.* Willetts, 118 Ill., 559).

"The first case in which the question arose is that of Brown *v.* Houston, 114 U. S., 622, in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in the open market there on account of the owners in Pennsylvania, and lying at New Orleans in flatboats for sale, became intermingled, on its arrival there, with the general property of the State, and was subject to taxation under the general laws of Louisiana, although it might have been, after arrival, sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country by a vessel bound to a foreign port. The case was affirmed in Pittsburgh & S. Coal Co. *v.* Bates, 156 U. S., 577, which differed from the former only in the fact that the coal did not reach New Orleans, the port of destination, but was still on the Mississippi River, nine miles above Baton Rouge, where it was held for sale. It ap-

peared that the boats were held subject to the orders of plaintiff to be navigated to such place or places as he might deem convenient or advantageous to the trade in which he was engaged.

"In Coe *v.* Errol, 116 U. S., 517, it was held that logs cut in New Hampshire, which were hauled down to the town of Errol, on the Androscoggin River in that State, to be thence floated down the river to Lewiston, Maine, and were awaiting a convenient opportunity for such transportation, were still a part of the general mass of property of the State, liable to taxation, if taxed in the usual way in which such property was taxed in that State. It was a stipulated fact that the timber thus cut had lain over one season, being about a year, in the Androscoggin River in that State, either in Errol, Dummer, or Milan; and that other timber referred to in the petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation. The question is thus stated by Mr. Justice Bradley: 'Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?' Said he: 'There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commenced their final movement for transportation from the State of their origin to that (the State) of their destination * * *. Until then it is reasonable to regard them as not only within the State of their origin but as a part of the general mass of the property of that State, subject to its jurisdiction, and liable to taxation there.'

"The substance of these cases is that, while the property is *at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to*

taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce, and is exempt from local assessment."

Mr. Justice McKenna, in holding that logs while waiting in a boom or sorting gap to be shipped by rail to a point outside the State are not the subject of interstate commerce so as to be exempt from State taxation, said in Diamond Match Co. *v.* Village of Ontonagon, 188 U. S., 93:

"In Brown *v.* Houston, 114 U. S, 622, the property (coal in barges) had reached the State, but was yet in the boats in which it had been brought into the State. While on the barges it was offered for sale. It was held it had become part of the property of the State and was subject to taxation. Pittsburg and S. Coal Co. *v.* Bates, 156 U. S., 577, had facts assimilating it to the case at bar, and it was affirmed on the authority of Brown *v.* Houston. As in the latter case the tax was on coal in barges shipped from the mines in Pennsylvania, and consigned to New Orleans, La. The coal, however, had not reached, as the coal in Brown *v.* Houston, its exact destination. To accommodate the exigencies of the owners' business, the barges (about 100 in number) were stopped and moored in the Mississippi River at a convenient mooring place about nine miles above the port of Baton Rouge.' The coal was held subject to taxation.

"In Coe *v.* Errol, 116 U. S., 517, logs which had been cut in the State of Maine, and others which had been cut in the State of New Hampshire, were floated in the course of transit down a stream in New Hampshire to the Town of Errol, in the latter State; thence to be floated down the Androscoggin River to the State of Maine. The Town of Errol assessed upon the property a county, town, school and highway tax. The tax was sustained by the Supreme Court of the State of New Hampshire as to the logs cut in that State, and abated as to those

cut in Maine. The judgment was affirmed by this Court.

"Mr. Justice Bradley, delivering the opinion of the Court, expressed the contentions of the parties in two questions:

'Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State? Do the owners' state of mind in relation to the goods—that is, his intent to export them—and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.'

"It is obvious that like questions could be framed upon the facts of the case at bar to express the propositions presented. Mr. Justice Bradley's observations therefore become pertinent and decisive. He discussed every consideration. He clearly exhibited the extent of the power of the State over the property within it, whether in motion or at rest, though destined for points out of it. He said:

'There must be a point of time when they (goods destined to other States) cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commenced their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on

their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.'

"And further:

'But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leav-

ing the State and going into another State. It is true, as was said in the case, The Daniel Ball, 10 Wall., 557, 565, *sub nom:* 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey.'

"These cases are referred to in Kelley *v.* Rhoads, 188 U. S., 1, as defining the taxing power of a State. And their substance is declared to be "that while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce, and is exempt from local assessment."

"In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another State. In the one case, though it have not reached its place of disembarkation or delivery it may be taxed, 114 U. S., 622. In the other case, until it be shipped or started on its final journey it may be taxed, 116 U. S., 517.

"The case at bar falls within this principle."

Mr. Justice Peckham, in Hopkins *v.* United States, 171 U. S., 588, said:

"If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stock yards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce?

Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the services collateral to such commerce and in the nature of a local aid or facility provided for the cattle owners towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce."

In the Hopkins case, *supra,* the Court was engaged in construing and applying the provisions of the Sherman Anti-Trust Act, and in the case of United States *v.* Knight, 156 U. S., 1, the construction of that act was involved, and Chief Justice Fuller said (pp. 13, 14):

"The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacture does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in Coe *v.* Erroll, 116 U. S., 517, in which the question before the Court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the Court, said: 'Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which

they commence their final movement from the State of their origin to that of their destination.'"

The coal having arrived at its destination may be stored for weeks or months or possibly years awaiting its demand for use. It is manufactured at the breakers into different sizes—a portion for domestic uses and the balance for use primarily in producing steam. It is sold in competition with coal from hundreds of mines, from many States in the Union and from foreign countries. Some of the coal may be sold to an individual for his domestic use, or to a dealer in coal, or to a manufacturer or to a steamship company or to an electric or steam railway company, in fact to whomsoever may desire to purchase it—but the price it may sell for depends on the size of the coal, its quality, the quantity desired, the amount the owner may have for sale, the locality, the character of the customer, the general conditions of the market—the price will vary from hour to hour. The sale of coal is a matter of private contract. The coal at destination being a part of the mass of the general property of the State, is subject to the jurisdiction of the State. The question of the price received from the sale of coal which may occur weeks or months after it arrived at destination surely is not a question which the Interstate Commerce Commission—clothed with its limited jurisdiction over interstate transportation—is justified in directing a witness to answer. Furthermore, it would have been impossible for the witness to truthfully answer such a question, and the law does not require impossible things.

VII.

THE LAWFUL RIGHTS OF APPELLEES.

The basis of this proceeding is the petition of Hearst and the evidence he adduced at the hearings.

The wrong he sustained will be sought in vain throughout this record of many hundred pages. Even his petition did not justify the proceeding. Nevertheless the summons of the Commission were responded to, and time and expense were not spared by the defendants in the performance of their political duties; but it has been well said that political expediency in matters of judicature is a false and hollow principle. But when Hearst sought to inspect purely domestic agreements in which he had absolutely no interest and which were made with persons not parties to the proceedings appellees were justified in saying to him—you have gone so far but you shall go no farther; and so with the vouchers which pertained to the agreements; and the impossible questions relating to the domestic transaction of producing coal and selling it.

Such an attempt was a violent invasion of individual rights, which neither the circumstances nor the law justified. In Boyd *v.* United States, 116 U. S., 627, Mr. Justice Bradley adopted the thought of Lord Camden, "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. * * * By the laws of England, every invasion of private property, be it ever so minute, is a trespass. * * * Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection."

And Mr. Justice Bradley said: "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. It is not the

breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

CONCLUSION.

The power granted by the Constitution to Congress over commerce between States is unquestioned.

Undoubtedly one of the chief objects sought by the framers of that instrument was uniform laws governing commerce between States, and subsequent legal and political history has proven the wisdom of that grant; but the States reserved to themselves the powers which were not granted by that instrument to the federal government, and among those powers which the States retained was jurisdiction over domestic agreements and transactions between its citizens.

The judgment of the Circuit Court should be affirmed.

WASHINGTON, March 7, 1904.

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